

82-812

APPENDIX

Supreme Court of the State of California
FILED

MAY 17 1973

MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE
United States

OCTOBER TERM, 1972

No. 812

THOMAS TONE STORER, ET AL., *Appellants*

VS.

EDMUND G. BROWN, JR. ET AL., *Appellees*

No. 6050

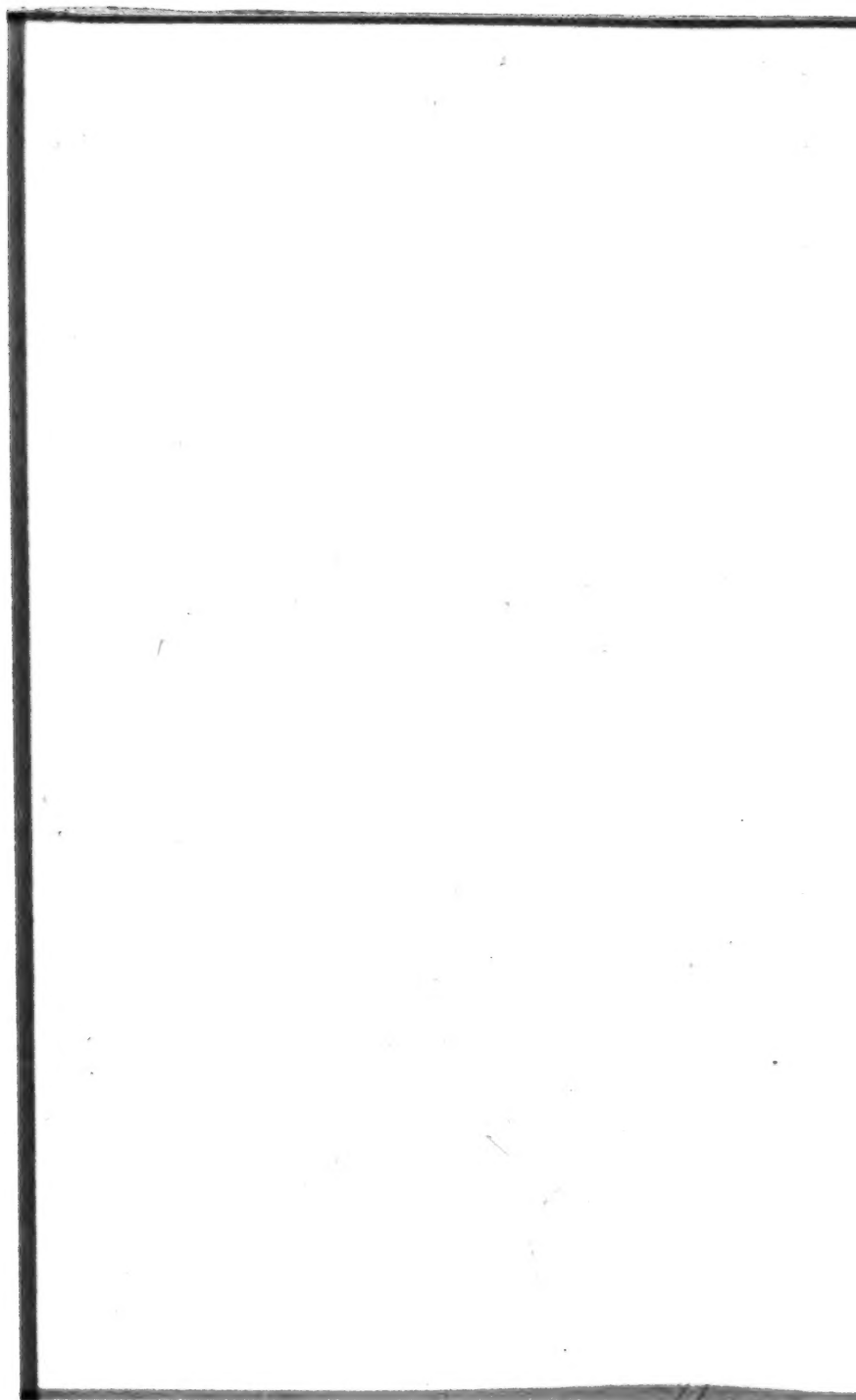
LAURENCE H. FROMMHAGEN, ET AL., *Appellants*

VS.

EDMUND G. BROWN, JR. ET AL., *Appellees*

On Appeal from the United States District Court
for the Northern District of California

Probable Jurisdiction Noted and Cases
Consolidated March 5, 1973



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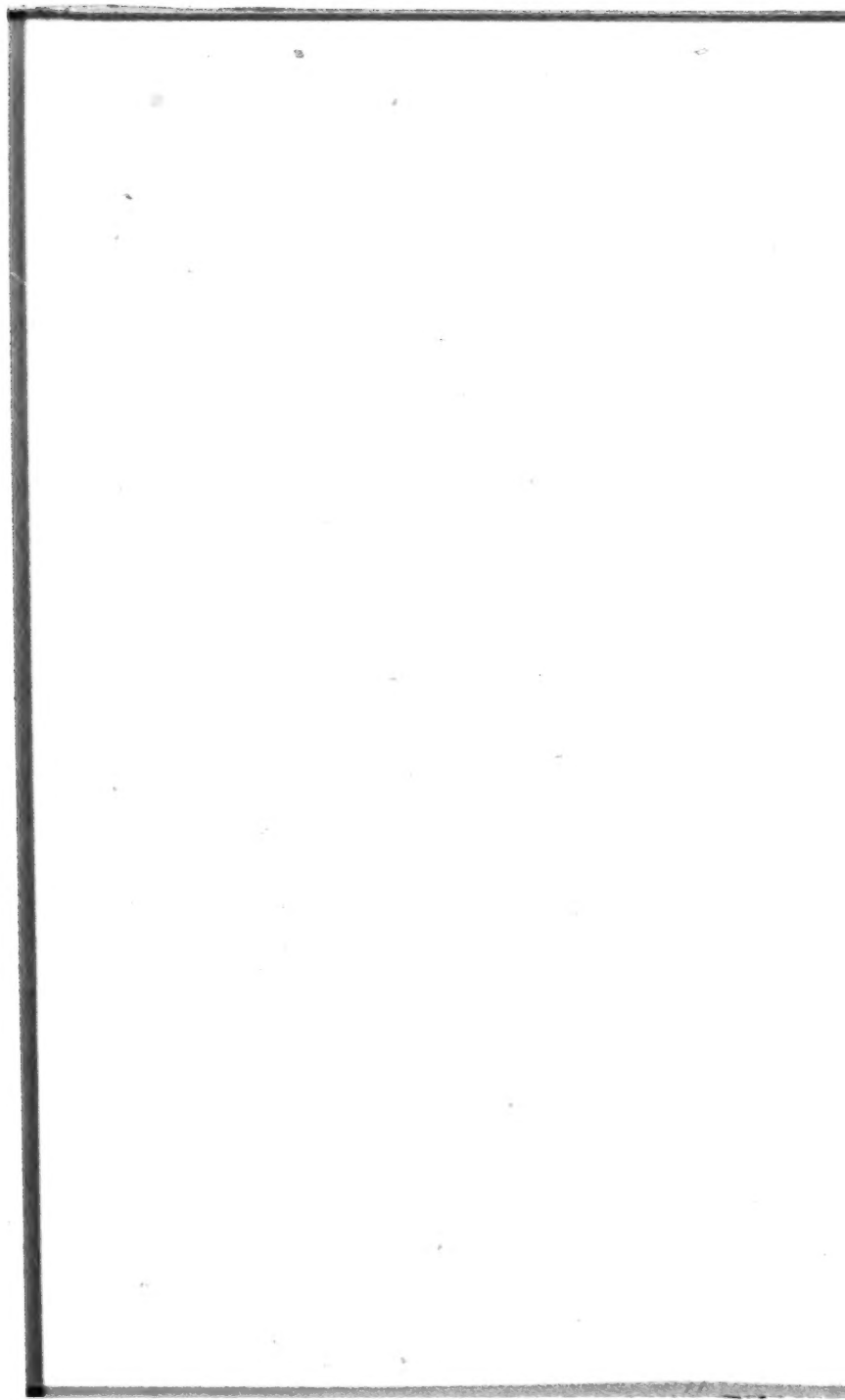
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DOCKET ENTRIES

Docket 72-0978

Filed 5-30-72

**In the United States District Court
for the Northern District of California**

**Thomas Tone Storer; Elizabeth
Johnson; Salle S. Soladay;
Robert Fracchia; and Philip
Drath
Plaintiffs**

**Edmund G. Brown, Jr., Secy of State of
Calif; and George H. Gness, County Clerk
for Marin County
Defendants**

Attorneys

**American Civil Liberties Union
Foundation of No. Calif.
593 Market St., S.F.**

vs.

**Attorney General of California
6000 State Building
San Francisco, CA 94102**

Cause

**Civil Rights Compl't: Inj & Decl
Relief (Elections suit challenging
Calif's scheme for independent
ballot access)**

Related to C-72-1468

1972:

May 30—

1. Filed Complaint; issued summons (Req for convening of 3-Judge Ct).
2. Filed Ord for proc serv by Anthony Lewis (Clerk).

June 6—

3. Filed mo for intervention of pltfs, 6-27-72/ 1:30.

June 26—

4. Filed pltfs' Response to mo for intervention.

June 27—

Ord: Ruling deferred on mo for intervention; 3-Judge Ct to be convened—AJZ.

July 13—

5. Filed Ord reassigning case to Judge Schnacke for fur procedgs—OJC.

17—

6. Filed memorandum & order convening 3 judge Court, consisting of Judges Oliver D. Hamlin, Robert H. Schnacke and William G. East.

July 17—

Mailed copy of complete file (Chambers, CJ) to Hon. Oliver D. Hamlin, William G. East and Robert H. Schnacke.

July 20—

7. Filed Ord Granting L. H. Frommhagen lv to to intervene as party pltf—RHS.

1972:

Aug. 7—

8. Filed intervening pltf Frommhagen's not. of mo for pre-injn, 8-31-72/2pm.
9. Filed pltf's not. & mo. for pre-injn, 8-31-72/2pm.
10. Filed pltf's Memo re pre-injn.
11. Filed Ord for proc serv by Harold Goff.
12. —(Mis-numbered: no #12 in this case).

Aug. 18—

13. Filed def't Sec'y of State's opp to pre-injn & mo to dismiss.
14. Filed def't Sec'y of State's Memo of pts & auths in opp to pre-injn & in supp of mo to dismiss.

Aug. 23—

Filed Ord that this case is related to C-72-1468 (In 72-1468).

Aug. 25—

15. Filed pltf's response to def't's memo in opp to pre-injn.

Aug. 29—

16. Filed ord for proc serv by Nancy M. Kane (clerk).

Sept. 6—

17. Filed pltf Frommhagen's rebuttal to oral args by counsel for def't-in-intervention.

Aug. 31—

Ord after hrg: mos to dismiss & for pre-injn—submitted.

1972:

Sept. 8—

18. Filed ltr from Frommhagen to RHS re non-appearance of counsel for deft Kelley.

Sept. 8—

19. Filed Opinion and Order: defts' mos to dismiss are Granted and actions (72-978 & 72-1468) are Dismissed.
(—RHS, ODH, Jr. WGE concurred but did not sign).

Sept. 13—

20. Filed Notice of Appeal to US Supreme Court (w/designation & pts on

Sept. 18—

Mailed not. to counsel of filing appeal.

Sept. 21—

21. Filed appellee's designation of record.

Sept. 25—

Rec'd copy of ltr from deft's atty to Ct. Reporter confirming order of transcript.

Oct. 10—

22. Filed notice of Appeal by Pltf—Intervenor Laurence H. Frommhagen.

Oct. 10—

Mailed Clerk notice of filing appeal to parties of record.

Oct. 17—

23. Filed ltr from County counsel of Marin County to clerk waiving transcript for appeal.

1972:

Oct. 18—

24. Filed letter from Mr. Frommshagen Pltff-
Intervenor designation of record on appeal.

Oct. 19 -72—

Made, Mailed Record On Appeal to Supreme
Court of the United States by Certified Mail
Receipt No. 224332.

Oct. 27—

25. Filed receipt from US Supreme Ct for record
on appeal.

Dec. 7—

26. Filed receipt from US Supreme Court for
record on appeal.

Dec. 19—

27. Filed Reporter's Transcript of Aug. 31, 1972.

1973:

Mar. 12—

28. Filed Ord from Supreme Ct granting appel-
lant's mo to proceed in forma pauperis.

I hereby certify that the annexed instrument is a
true and correct copy of the original on file in my
office.

ATTEST:

CHARLES J. ULFERS

Clerk, U. S. District Court
Northern District of California

By /s/ (illegible)

Deputy Clerk

Dated April 3, 1973

Paul N. Halvonik
 Charles C. Marson
 Peter E. Sheehan
 American Civil Liberties Union Foundation
 of Northern California, Inc.
 593 Market Street, Suite 227
 San Francisco, California 94105
 Telephone: 433-2750
 Attorneys for Plaintiffs

In the United States District Court
 for the Northern District of California

No. C-72-978

AJZ

Thomas Tone Storer, Elizabeth Johnson,
 Salle S. Soladay, Robert Fracchia and
 Philip Drath,

Plaintiffs,

vs.

Edmund G. Brown, Jr., Secretary of
 State of the State of California and
 George H. Gnos, County Clerk for the
 County of Marin,

Defendants.

[Filed May 30, 1972]

CIVIL RIGHTS COMPLAINT FOR INJUNC-
 TIVE RELIEF, DECLARATORY JUDGMENT
 AND REQUEST FOR THE CONVENING
 OF A THREE-JUDGE COURT

Plaintiffs complain of defendants as follows:

I.

Jurisdiction of this Court is invoked under Article I, §2, and the First and Fourteenth Amendments to the United States Constitution and Title 28, United States Code, §§1331a, 1343(4), 1357, 2201, 2202, 2281, 2284; Title 42 of the United States Code, §§1981, 1983, 1985(3) and 1988. The amount in controversy exceeds \$10,000.

II.

Plaintiff Thomas Tone Storer, a native-born citizen who is over the age of 25 and is an inhabitant of California, is also a registered voter, unaffiliated with a political party, residing in Marin County, Sixth Congressional District, State of California. Plaintiff Storer is a candidate for the United States Congress, Sixth Congressional District, as an independent, in the November 7, 1972 general election and wishes to appear on that election ballot and be so designated.

III.

Plaintiff Elizabeth Johnson is a citizen of the United States, a resident of Marin County and a registered voter affiliated with the Democratic Party. Plaintiff Johnson is a supporter of plaintiff Storer who voted for him when he was a candidate for Supervisor of the County of Marin. She wishes to exercise her right to freedom of association and political involvement by actively supporting Storer's candidacy for Congress, voting for him in the November, 1972 election, and wishes his name to appear on the ballot.

IV.

Salle S. Soladay is a citizen of the United States, a resident of Marin County, and a registered voter affiliated with the Democratic Party. She is a supporter of plaintiff Storer and desires to exercise her right to freedom of association and political involvement by actively supporting Storer's candidacy for Congress, voting for him in the November, 1972 election, and wishes his name to appear on the ballot.

V.

Robert Fracchia is a citizen of the United States, a resident of Marin County, a registered voter affiliated with the Democratic Party and Student Body President of Terra Linda High School. He is a supporter of plaintiff Storer and wishes to exercise his right of association and political involvement by actively supporting Storer's candidacy for Congress, voting for him in the November, 1972 election, and wishes Storer's name to appear on the ballot.

VI.

Philip Drath is a citizen of the United States, a resident of Marin County and a registered voter affiliated with the Democratic Party. He is a supporter of plaintiff Storer and wishes to exercise his right of association and political involvement by actively supporting Storer's candidacy for Congress, voting for him in the November, 1972 election, and wishes Storer's name to appear on the ballot.

VII.

Defendant Edmund G. Brown, Jr., is, and at all relevant times mentioned herein was, the duly elected, qualified and acting Secretary of State of the State of California. Defendant George H. Gnos, is, and at all relevant times mentioned herein was, the duly elected County Clerk of the County of Marin. Defendants, at all times relevant to this action, have had the duty of certifying candidates for the United States Congress, Sixth Congressional District, in the general election of November 7, 1972, and of performing all official acts enabling qualified persons to appear on the ballot in the said election. At all relevant times herein mentioned defendants have acted, and continue to act, in concert and under color of state law.

VIII.

Plaintiff Storer is an attorney-at-law who is and has been politically active in Marin County and the Sixth Congressional District. In November of 1964 he was elected to the Board of Supervisors of Marin County after defeating an incumbent in a run-off election. In 1966 he sought the Democratic nomination for United States Congressman in the First Congressional District which then included Marin County. Storer won the nomination but was defeated by the incumbent Congressman at the general election. In 1968 plaintiff Storer sought re-election to the Board of Supervisors and was narrowly defeated.

IX.

Plaintiff Storer, for most of his political life, has been affiliated with the Democratic Party. In the past few years, however, he has been distressed at the quality of political leadership in the United States and has concluded that the situation will not improve as long as the Democratic and Republican Parties, which he feels are excessively controlled by money interests, dominate the country's political life. Plaintiff Storer made his disaffection with the Democratic Party formal by changing his registration from "Democrat" to "decline to state" in January of 1972.

X.

Plaintiff Storer is ready, willing and able to tender the filing fee required by California law of a candidate for Representative in the United States Congress and meet any other reasonable requirements for a position on the November ballot as an independent candidate. California statutory law, however, prohibits him from appearing on the general election ballot as an independent candidate for Congress in the following ways:

a) California Elections Code § 6830(d) prohibits any person who has been registered as affiliated with a political party at any time after June 6, 1971, from appearing on the ballot as an independent candidate. Plaintiff Storer, as noted above, was registered as affiliated with the Democratic Party until January of 1972;

b) California Elections Code § 6830(c) prohibits any one who has voted "at the immediately preceding

primary election at which a candidate was nominated for the office mentioned in the nomination paper" from running as an independent candidate for Congress. Storer intends to vote in the primary election of June 6, 1972, in order to exercise his franchise on non-partisan matters; but because nominees for the office of United States Representative from the Sixth Congressional District will be voted upon by partisan voters at that primary election, plaintiff Storer's exercise of his right to the franchise results in his being unable to appear on the ballot as an independent Congressional candidate:

c) California Elections Code §§ 6833, 6864 and 6831, in combined effect, make it virtually impossible for anyone to qualify as an independent candidate on the November election ballot:

1) § 6831 provides that plaintiff Storer's name may not appear on the ballot unless he acquires the signatures of not less than 5% nor more than 6% of the entire vote cast in the Sixth Congressional District in the preceding general election, in the case of the Sixth Congressional District that means 9,322 signatures;

2) §§ 6833 and 6864 provide that plaintiff Storer has but 24 days in which to acquire those signatures, he cannot circulate nomination petitions for voters signatures before August 15, 1972, and he must have acquired the requisite number of valid signatures by September 8, 1972;

3) California Elections Code § 6830(c) provides that no person may validly sign plaintiff Storer's nomination paper who voted in the primary election of June 6, 1972.

By contrast, a partisan candidate for Congress may appear on the primary ballot with no more than 40 signatures of sponsors and the persons signing his nominating papers are not excluded from doing so by virtue of their participation in any election.

XI.

Plaintiffs, and each of them, intend to vote in the primary election of June 6, 1972. Plaintiff Storer, as already noted, intends to mark his non-partisan ballot. Plaintiff Johnson intends to mark her Democratic ballot but does not intend to vote for either of the choices presented as Democratic nominee for Congress. Plaintiff Soladay intends to mark her Democratic ballot but does not intend to vote for either of the Democratic nominees for Congress. Plaintiff Fracchia intends to mark his Democratic ballot and intends to vote for one of the Democratic candidates seeking that party's nomination for Congress. Plaintiff Drath intends to mark his Democratic ballot and intends to vote for one of the candidates seeking that Party's nomination for Congress.

XII.

Plaintiffs Johnson, Soladay, Fracchia and Drath, and each of them, wish to sign the nomination papers of plaintiff Storer as an independent candidate for the office of Representative in the United States House but will be foreclosed from doing so because of their participation in the primary election. Said plaintiffs, and each of them, have signed no nomination papers for any other candidate for United States

Congressman in the primary election of June 6, 1972, or the general election of November 7, 1972.

XIII.

Plaintiffs are informed and believe and therefore allege that no one has ever been able to qualify as an independent candidate for a partisan office pursuant to the current provisions of the California Elections Code.

XIV.

Plaintiffs are informed and believe and therefore allege that defendants, and each of them, contend that the above-described statutory scheme inhibiting the access of independent candidates to the general election ballot is a constitutional exercise of state authority.

XV.

Unless restrained by this Court, defendants, and each of them, will deny plaintiff Storer a place on the ballot as an independent candidate in the election of November 7, 1972, for the sole reason that plaintiff Storer cannot comply with the aforementioned statutory provisions. This denial will abridge the following constitutional rights of plaintiff Storer:

- a) His fundamental constitutional right to seek and hold an office notwithstanding the absence of any compelling state interest supporting the statutory scheme;
- b) His right to equal protection of the laws guaranteed by the Fourteenth Amendment for the reason

that the above-described statutory requirements for an independent candidate constitute invidious discrimination unrelated to any legitimate governmental ends;

c) His right to due process of law in that the above-described requirements for independent candidacy are arbitrary and capricious and are unrelated to proper governmental purposes contrary to the Fourteenth Amendment, and

d) His right freely to express his views and effectively participate in the political processes of the United States and California as guaranteed by the First Amendment to the United States Constitution.

XVI.

Unless restrained by this Court, the defendants, and each of them, by requiring plaintiff Storer to comply with the above-described statutory scheme for independent candidates, will deprive plaintiffs Johnson, Soladay, Fracchia and Drath of the opportunity to vote and participate actively in the political processes on an equal basis in support of the candidate of their choice in the election for Representative from the Sixth Congressional District. As a consequence, their constitutional rights will be violated in the following respects:

a) Their right to equal protection of the laws and due process of the law guaranteed by the Fourteenth Amendment to the Constitution, will be abridged;

b) Their right to express their views, organize for political purpose, and effectively cast their ballots

will be abridged contrary to the First and Fourteenth Amendments to the United States Constitution.

XVII.

Plaintiffs, and each of them, have suffered and will continue to suffer irreparable harm as a result of the abrogation and denial of rights guaranteed to them by the Constitution of the United States. They cannot organize effectively around plaintiff Storer's candidacy until such time as defendants desist from requiring plaintiff Storer to comply with the above-described unconstitutional statutory scheme for independent candidacy in California. They will continue to suffer irreparable harm in the future so long as defendants require plaintiff Storer to comply with the above-described unconstitutional statutory scheme for independent candidacy in California.

For a second and distinct cause of action, plaintiffs incorporate by reference the allegations of paragraphs I through XIII of this complaint and further allege as follows:

XVIII.

California Elections Code §6830(d), by absolutely prohibiting plaintiff Storer from appearing on the ballot as a candidate for Representative to the United States Congress because he has, within the past year been affiliated with the Democratic Party, and California Elections Code §6830(c) by absolutely prohibiting plaintiff Storer from appearing on the ballot as a candidate for United States Representative if he votes in the primary election of June 6, 1972, un-

constitutionally add qualifications for Representative in the United States Congress not contained in, and inconsistent with, Article I, §2, Clause 2 of the United States Constitution.

XIX.

The addition of qualifications for Representative in the United States Congress not contained in Article I, §2, Clause 2 of the United States Constitution violate rights guaranteed to plaintiffs, and each of them, by Article I, §2, Clause 2, of the Constitution.

XX.

Plaintiffs are informed and believe and therefore allege that defendants, and each of them, contend that the absolute prohibition on plaintiff Storer's candidacy provided by §§6830(c) and (d) of the California Elections Code is a constitutional exercise of state power and that, unless restrained by this Court, defendants will prohibit plaintiff Storer from appearing as an independent candidate for United States Congress in the Sixth Congressional District because of his inability to comply with §§6830(c) and (d).

XXI.

There is an actual controversy existing which this Court may and properly should adjudicate at this time.

Wherefore, plaintiffs pray as follows:

1. For the convening of a three-judge court to hear and determine the controversy;

2. That California Elections Code §§6830(c) and (d), 6831, 6833 and 6864 be declared unconstitutional, void and a nullity by virtue of conflict with the First and Fourteenth Amendments to the United States Constitution;

3. That subsections (d) and (e) of the California Elections Code §6830 be declared unconstitutional, void and a nullity by virtue of conflict with Article I, §2, Clause 2 of the United States Constitution;

4. That defendants, and each of them, their agents, representatives, alternates, successors and anyone connected therewith be enjoined from directly or indirectly enforcing California Elections Code §§6830(c) and (d), 6831, 6833 and 6864 for the reasons mentioned above in paragraphs "2." and "3.";

5. That, upon plaintiff Storer's tendering of the statutory filing fee and the presentation by him of a nomination petition signed by at least forty electors qualified to vote in the Sixth Congressional District, defendants, and each of them, their agents, representatives, alternates, successors, and anyone connected therewith, be enjoined from, directly or indirectly, refraining to certify plaintiff Storer as a candidate for United States Representative in California's Sixth Congressional District and refraining from placing plaintiff Storer's name on the November 7, 1972, general election ballot as a candidate for United States Representative in the said Sixth District;

6. That, pending a full evidentiary hearing at which a permanent injunction will be sought, a pre-

liminary injunction be issued granting plaintiffs the relief for which they pray in the immediately preceding paragraph (paragraph "5.");

7. That plaintiffs be granted their costs in this suit;

8. That this Court grant such other and further relief as is just and proper in the premises.

Dated: May 30, 1972

Respectfully submitted,
 Paul N. Halvonik
 Charles C. Marson
 Peter E. Sheehan
 By Paul N. Halvonik
 Attorneys for Plaintiffs

Verification

State of California

City and County of San Francisco—ss

Thomas Tone Storer, being duly sworn, deposes and says:

That he is one of the plaintiffs in the foregoing Complaint for Injunctive Relief; that he has read the complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information and belief, and as to those matters he believes it to be true.

/s/ Thomas Tone Storer

Thomas Tone Storer

Subscribed and sworn to before me

this 30th day of May, 1972.

/s/ Pamela S. Ford

(Seal)

Pamela S. Ford, Notary Public

In and for the City and County of

San Francisco, State of California

My Commission Expires December 30, 1975

United States District Court For The
Northern District of California

No. C 72-978 AJZ

Thomas T. Storer, et al.,	} Plaintiff,
vs.	
Edmund G. Brown, Jr., et al.,	
	Defendant.

[Filed July 13, 1972]

REASSIGNMENT OF CAUSE

Good Cause Appearing Therefor,

It is Ordered that the above-entitled cause is re-assigned to Robert H. Schnacke for all further proceedings.

Dated: July 13, 1972

Transferring Judge
/s/ Robert H. Schnacke
Accepting Judge

Approved by the Assignment Committee:
by: /s/ Oliver J. Carter
Chief Judge

**MEMORANDUM WITH REFERENCE TO
THOMAS T. STORER et al. vs. EDMUND
G. BROWN, JR., et al. No. C 72-978-RHS**

District Judge Alfonso J. Zirpoli received the complaint in the above-entitled case and certified it as a case appropriate for a three-judge district court to be appointed by the chief judge of the Ninth Circuit.

Soon thereafter, Judge Zirpoli became incapacitated probably for several weeks.

Chief Judge Oliver J. Carter, deeming the case to be one requiring attention at a reasonably early date, caused another district judge to be drawn by lot to replace Judge Zirpoli as the "receiving" judge. The name drawn was District Judge Robert H. Schnacke.

If any party has any objection under applicable statutes to the replacement of Judge Zirpoli by Judge Schnacke, he will file it no later than seven days after the date of the filing of this order in the district court clerk's office.

/s/ Richard H. Chambers
Chief Judge, Ninth Circuit

ORDER DESIGNATING UNITED STATES
CIRCUIT JUDGE AND UNITED STATES
DISTRICT JUDGES PURSUANT TO §2284,
TITLE 28, UNITED STATES CODE

Whereas in my judgment the public interest so requires, I, pursuant to the provisions of §2284, Title 28, United States Code, do hereby designate and appoint the

Honorable Oliver D. Hamlin,
United States Circuit Judge for the Ninth Circuit,
and the

Honorable Robert H. Schnacke,
United States District Court for the Northern District of California, and the

Honorable William G. East,
Senior United States District Judge for the District of Oregon, to hold district court for the Northern District of California at a time and place to be agreed upon by said judges, and to hear and determine the following cause:

Thomas T. Storer v. Edmund G. Brown, Jr.,
C-72-978,

and all motions and proceedings therein.

Dated: July 14, 1972.

/s/ Richard H. Chambers
Chief Judge, Ninth Circuit

IM

cc: Judge Hamlin
cc: Judge Schnacke
cc: Judge East
cc: Clerk, N.Cal.
cc: Clerk, 9 CA
cc: Clerk, Ore.

Paul N. Halvonik
Charles C. Marson
Peter E. Sheehan

American Civil Liberties Union Foundation
of Northern California, Inc.
593 Market Street, Suite 227
San Francisco, California 94105
Telephone: 433-2750
Attorneys for Plaintiffs

—
In The United States District Court
For The Northern District of California
—

No. C-72-978 AJZ
—

Thomas Tone Storer, et al.,	} Plaintiffs,
vs.	
Edmund G. Brown, Jr., et al.,	} Defendants.

[Filed August 7, 1972]

NOTICE OF MOTION
and

MOTION FOR PRELIMINARY INJUNCTION

To the above-named Defendants, and to the Governor
and Attorney General of the State of California:

Please Take Notice that on August 31, 1972, at
2:00 P.M., or as soon thereafter as counsel can be

heard, in Courtroom No. 5 at 450 Golden Gate Avenue, San Francisco, California, plaintiffs will move for an order preliminarily enjoining defendants, and each of them, their agents, representatives, alternates, successors, and anyone connected therewith, from, directly or indirectly, refraining to certify plaintiff Storer as a candidate for United States Representative in California's Sixth Congressional District and refraining from placing plaintiff Storer's name on the November 7, 1972 general election ballot as a candidate for United States Representative in the Sixth District upon plaintiff Storer's tendering of the statutory filing fee and the presentation by him of a nomination petition signed by at least 40 electors qualified to vote in the Sixth Congressional District.

Said Motion will be based upon this Notice and Motion, the Memorandum of Points and Authorities on file herein, and upon all of the pleadings and papers filed herein.

Dated: August 2, 1972

Respectfully submitted,

Paul N. Halvonik

Charles C. Marson

Peter E. Sheehan

By Charles C. Marson

Attorneys for Plaintiffs

Evelle J. Younger, Attorney General
of the State of California

Iver E. Ekjeie

Assistant Attorney General

Clayton P. Roche

Deputy Attorney General

6000 State Building

San Francisco, California 94102

Telephone: (415) 557-1586

Attorneys for Defendant

Secretary of State

United States District Court For The
Northern District of California

No. C-72-978 AHS

Thomas Tone Storer, et al.,

Plaintiffs,

vs.

Edmund G. Brown, Jr., etc., et al.,

Defendants.

Laurence H. Frommhagen, etc., et al.,

Plaintiffs in Intervention,

vs.

Tom M. Kelley, etc.,

Defendant in Intervention.

DEFENDANT SECRETARY OF STATE'S
OPPOSITION TO PRELIMINARY
INJUNCTION
and
MOTION TO DISMISS THE ACTION
(Before Three-Judge Court)

Defendant Secretary of State moves this Court to dismiss the action on the following grounds:

1. The complaints of plaintiffs and intervenors fail to state a claim against the defendant upon which relief can be granted;
2. The plaintiffs and intervenors are guilty of laches;
3. The complaints fail to join necessary and indispensable parties, to wit, the candidates in the Sixth and Twelfth Congressional Districts.

Defendant Secretary of State opposes the granting of a preliminary injunction on the same above-stated grounds and the additional grounds that:

1. A preliminary injunction should not be granted in that it would provide the ultimate relief requested; and
2. A preliminary injunction should not be granted in that in balancing the equities, nine million California voters have the right to an election undisrupted by eleventh-hour lawsuits.

Dated: August 18, 1972.

Respectfully submitted,

Evelle J. Younger, Attorney General
of the State of California

Iver E. Skjeie

Assistant Attorney General

/s/ Clayton P. Roche

Clayton P. Roche

Deputy Attorney General

Attorneys for Defendant
Secretary of State

Affidavit Of Thomas Tone Storer

Thomas Tone Storer, attorney at law, after first being duly sworn does swear and state that:

He does seek to be an independent candidate for the United States Congress, Sixth Congressional District, State of California;

On September 5, 1972, Thomas Tone Storer did call the elections department, County of Marin, State of California, and spoke with the head of said department, Peter C. Meyer;

Thomas Tone Storer did at that time ask Mr. Meyer if he, Mr. Storer, could take out nomination papers as an independent candidate for Congress in the Sixth Congressional District;

Peter C. Meyer replied, "You can not take out nomination papers as an independent candidate for Congress in the Sixth congressional District because you have been a registered Democrat within two (2) years of the most recent primary."

Dated: September 6, 1972

/s/ Thomas Tone Storer
Thomas Tone Storer

State of California
County of Marin—ss.

On September 6, 1972 before me, the undersigned, a Notary Public in and for said County and State, personally appeared Thomas Tone Storer, Attorney at Law, known to me to be the person whose name

is subscribed to the within instrument and acknowledged that he executed the same.

(Seal) /s/ Wanda Willey
Wanda Willey
Notary Public—California
County of Marin

My Commission Expires September 21, 1972

DOCKET ENTRIES**Docket 72-1468****Filed 8-11-72**

In the United States District Court
for the Northern District of California

(3 Judge Court—
Judges Hamlin, Schnacke & East)

Gus Hall, Jarvis Tyner,
Albert J. Lima, Margaret Wilkinson,
Juan Lopez, and Joe Graham,
Plaintiffs

vs.

Edmund G. Brown, Jr.
Secretary of State of the
State of California
Defendants

—Attorneys—

Charles C. Marson & Peter E. Sheehan
Amer. Civil Liberties Union
Foundation of No. Calif. Inc.
593 Market St., Suite 227
San Francisco, CA 94105

Attorney General
State of California
6000 State Building
San Francisco, CA 94102

—Cause—

Civil Rights

Related to Case C-72-978

Aug. 11—

1. Filed complaint, issued summons
2. Filed Ord. for serv. other than U.S. Marshall to Harold Goff
3. Filed notice of Requirement of Three-Judge Court.

Aug. 15—

4. Filed Pltf's Notice and mo for preliminary injunction hrg on 9/8/72 @ SAW

Aug. 16—

5. Filed notice of convening 3 judge Court, Notice mailed to Parties of recor and Judge Richard Chambers CCA.

Clerk

Aug. 18—

6. Filed deft's notice of related case to 72-978
RHS

Aug. 21—

7. *Filed Ord. of 9th. CCA appointing and designating Hon. Oliver D. Hamlin of 9th. CCA, Hon. William T. Sweigert of No. Dist. Calif., and Hon. William G. East of Dist. of Oreg. to hold Three Judge Court. (Chambers C.J.)*

Aug. 23—

8. *Filed ORD reassigning as related case to Judge Schnacke*

Aug. 25—

9. Filed Amended ORD designating 3-Judge Ct:
Judge Sweigert replaced by Judge Schnacke
Mailed file folders to 3 Judges (ODH, RHS,
WGE) (clerk)
10. Filed deft's opp to pre-injn & mo to dismiss
11. Filed deft's pts & auths in opp to granting of
pre-injn & in supp of mo to dismiss

Sept. 6—

12. Filed Stip. & ORD: (1) oral arg waived by
both sides; (2) all common questions will
abide by result of *Storer v. Brown* (72-978);
(3) any spec questions or issues not raised by
Storer case are submt'd for determ of Ct. on
briefs already filed herein. —RHS

Sept. 8—

Filed Opinion and Order: defts mos to dis-
miss in this action and in C-72-978 are
Granted and Actions are Dismissed. (In
72-978)

(—RHS, ODH, Jr.) (WGE concurred but did
not sign)

Sept. 13—

Filed Notice of Appeal to US Supreme Court
(In 72-978) (w/designation)

Sept. 18—

Mailed not. to counsel of filing appeal

Sept. 21—

13. Filed appellee's designation of record

Oct. 19-72—

Made, Mailed Record On Appeal To Supreme
Court Of The United States by Certified Mail
Receipt No. 224332

I hereby certify that the annexed instrument is a
true and correct copy of the original on file in my
office.

ATTEST:

CHARLES J. ULFERS

Clerk, U. S. District Court
Northern District of California

By /s/(illegible)

Deputy Clerk

Dated October 19, 1972

Charles C. Marson
 Peter E. Sheehan
 American Civil Liberties Union Foundation
 of Northern California, Inc.
 593 Market Street, Suite 227
 San Francisco, California 94105
 Telephone: 433-2750
 Attorneys for Plaintiffs

In The United States District Court
 For The Northern District of California

Category: Civil Rights

No. C-72-1468 WTS

Gus Hall, Jarvis Tyner, Albert J. Lima,
 Margaret Wilkinson, Juan Lopez, and
 Joe Graham,

Plaintiffs,

vs.

Edmund G. Brown, Jr., Secretary of
 State of the State of California,

Defendant.

[Filed August 11, 1972]

COMPLAINT FOR DECLARATORY
 AND INJUNCTIVE RELIEF

Plaintiffs complain of defendants as follows:

I.

Jurisdiction of this Court is invoked under the First and Fourteenth Amendments to the United States Constitution and Title 28, United States Code, §§ 1331(a), 1343(4), 1357, 2201, 2202, 2281, 2284; Title 42 of the United States Code, §§ 1981, 1983, 1985(3) and 1988. The amount in controversy exceeds \$10,000.

II.

Plaintiff Gus Hall is a native-born citizen who is over the age of 35 and who has been a resident of the United States during the last fourteen years. He has been and is now a member of the Communist Party of the United States, which does not qualify as a "political party" under the requirements of California Elections Code §6430. Plaintiff Hall is a candidate for the office of President of the United States in the November 7, 1972 general election. He wishes to run as an independent candidate for that office in the State of California and to be so designated on the election ballot.

III.

Plaintiff Jarvis Tyner, a native-born citizen who is 31 years of age and who has been a resident of the United States during the last fourteen years, has been and is a member of the Communist Party of the United States, which does not qualify as a "political party" under the requirements of California

Elections Code §6430. Plaintiff Tyner, who is a candidate for the office of Vice President of the United States in the November 7, 1972 general election, wishes to run as an independent candidate for that office in the State of California and to be so designated on the election ballot.

IV.

Plaintiff Margaret Wilkinson is a citizen of the United States, a resident of the State of California and a registered voter affiliated with the Democratic Party. Plaintiff Wilkinson is a supporter of plaintiffs Hall and Tyner and wishes to exercise her right to freedom of association and political involvement by actively supporting Hall's and Tyner's candidacies for President and Vice President, respectively, and by voting for them in the November, 1972 election, and wishes their names to appear on the ballot.

V.

Plaintiff Albert P. Lima is a citizen of the United States, a resident of the State of California and a registered voter affiliated with the Communist Party of the United States. Plaintiff Lima is a supporter of plaintiffs Hall and Tyner and wishes to exercise his right to freedom of association and political involvement by actively supporting Hall's and Tyner's candidacies for President and Vice President, respectively, and by voting for them in the November 1972 election, and wishes their names to appear on the ballot.

VI.

Plaintiffs Juan Lopez and Joe Graham are citizens of the United States, residents of the State of California and registered voters affiliated with La Raza Unida Party. Plaintiffs Lopez and Graham are supporters of plaintiffs Hall and Tyner and wish to exercise their rights to freedom of association and political involvement by actively supporting Hall and Tyner for the offices of President and Vice President, respectively, and by voting for them in the November 1972 election, and desire Hall's and Tyner's names to appear on the ballot.

VII.

Defendant Edmund G. Brown, Jr., is, and at all relevant times referred to herein has been, the duly elected, qualified and acting Secretary of State of the State of California. Defendant, at all times relevant to this action, has had the duty of certifying candidates for the offices of President and Vice President of the United States in the general election of November 7, 1972, and of performing all official acts enabling qualified persons to appear on the ballot in the said election. At all relevant times, defendant has acted, and continues to act, under color of state law.

VIII.

Plaintiff Hall and Tyner are ready, willing and able to tender the filing fees required by California law of candidates for President and Vice President of the United States, respectively, and to meet any

other reasonable requirements for positions on the November ballot as an independent candidate. California statutory law, however, prohibits them from appearing on the general election ballot as independent candidates in the following way: California Elections Code §§6830, 6833, 6864 and 6831, in combined effect, make it virtually impossible for anyone to qualify as an independent candidate on the November election ballot in that:

1) §6831 provides that plaintiff Hall's name and plaintiff Tyner's name may not appear on the ballot unless they acquire the signatures of not less than 5% nor more than 6% of the entire vote cast in the State of California in the preceding general election; in this case, that means more than 325,000 signatures.

2) §§6833 and 6864 provide that plaintiffs Hall and Tyner have but 24 days in which to acquire those signatures, they cannot circulate nomination petitions for voters' signatures before August 15, 1972, and they must have acquired the requisite number of valid signatures by September 8, 1972.

3) California Elections Code §6830(c) provides that no person may validly sign plaintiff Hall's or plaintiff Tyner's nomination papers who voted in the primary election of June 6, 1972.

By contrast, §6082 provides that a partisan candidate may appear on the primary ballot with no more than .5% of the vote cast for that party's candidate for Governor in the 1970 gubernatorial elections; in the case of Senator George McGovern, the Democratic candidate for the Presidency, less than

15,000 signatures were required; in the case of President Richard Nixon, the Republican candidate for the Presidency in the 1972 election, less than 18,000 signatures were required. Furthermore, no person is excluded from signing the nominating papers of a partisan candidate by virtue of his participation in any election.

IX.

Plaintiffs Wilkinson and Graham did participate in the June 6, 1972 Democratic primary election; although Graham did not vote for any of the nominees for the office of President, they did mark their ballots on other issues.

X.

Plaintiffs Wilkinson and Graham wish to sign the nomination papers of plaintiff Hall as an independent candidate for the office of President of the United States and of plaintiff Tyner as an independent candidate for the office of Vice President of the United States. They will be foreclosed from doing so because of their participation in the primary election. Said plaintiffs have signed no nomination papers for any other candidate for either of the abovementioned offices in the primary election of June 6, 1972, or in the general election of November 7, 1972.

XI.

Plaintiffs Lima, Wilkinson, Lopez and Graham wish to vote for plaintiff Hall as an independent candidate for President of the United States and for

plaintiff Tyner as an independent candidate for Vice President of the United States. They will be foreclosed from doing so because of the existence of California Elections Code §§ 6833, 6834, and 6830(c), which make it effectively impossible for any person to qualify as an independent candidate for either of these offices. Plaintiffs Lima, Wilkinson, Lopez and Graham have signed no nomination papers for any other candidate for either of the abovementioned offices in the primary election of June 6, 1972, or in the general election of November 7, 1972.

XII.

Plaintiffs are informed and believe and therefore allege that defendant contends that the above-mentioned statutory scheme inhibiting the access of independent candidates to the general election ballot is a constitutional exercise of state authority.

XIII.

Unless restrained by this Court, defendant will deny plaintiffs Hall and Tyner a place on the ballot as independent candidates in the election of November 7, 1972, for the sole reason that plaintiffs Hall and Tyner cannot comply with the aforementioned statutory provisions. This denial will abridge the following constitutional rights of plaintiffs Hall and Tyner:

- a) their fundamental constitutional right to seek and hold offices notwithstanding the absence of any compelling state interest supporting the statutory scheme;

b) their right to equal protection of the laws guaranteed by the Fourteenth Amendment for the reason that the above-described statutory requirements for an independent candidate constitute invidious discrimination unrelated to any legitimate governmental ends;

c) their right to due process of law in that the above-described requirements for independent candidacy are arbitrary and capricious and are unrelated to proper governmental purposes contrary to the Fourteenth Amendment, and

d) their right freely to express their views and effectively participate in the political processes of the United States and California as guaranteed by the First Amendment to the United States Constitution.

XIV.

Unless restrained by this Court, the defendant, by requiring plaintiffs Hall and Tyner to comply with the above-described statutory scheme for independent candidates, will deprive plaintiffs Lima, Wilkinson, and Lopez of the opportunity to vote and participate actively in the political processes on an equal basis in support of the candidates of their choice in the election for President and Vice President of the United States. As a consequence, their constitutional rights will be violated in the following respects:

a) their right to equal protection of the laws and due process of the law guaranteed by the Fourteenth Amendment to the Constitution, will be abridged;

b) their right to express their views, organize for political purpose, and effectively cast their ballots will be abridged contrary to the First and Fourteenth Amendments to the United States Constitution.

XV.

Plaintiffs, and each of them, have suffered and will continue to suffer irreparable harm as a result of the abrogation and denial of rights guaranteed to them by the Constitution of the United States. They cannot organize effectively around the candidacies of plaintiffs Hall and Tyner until such time as defendant desists from requiring plaintiffs Hall and Tyner to comply with the above-described unconstitutional statutory scheme for independent candidacy in California. They will continue to suffer irreparable harm in the future so long as defendant requires plaintiffs Hall and Tyner to comply with the above-described unconstitutional statutory scheme for independent candidacy in California.

XVI.

Plaintiffs are informed and believe and therefore allege that defendant contends that the absolute prohibition on plaintiff Hall's and plaintiff Tyner's candidacies provided by §6830(c) of the California Elections Code is a constitutional exercise of state power and that, unless restrained by this Court, defendant will prohibit plaintiffs Hall and Tyner from appearing as independent candidates for the offices of President and Vice President of the United States,

respectively, because of their inability to comply with §6830(c).

XVII

There is an actual controversy existing which this Court may and properly should adjudicate at this time.

Wherefore, plaintiffs pray as follows:

1. For the convening of a three-judge court to hear and determine the controversy;

2. That California Elections Code §§6830(c), 6831, 6833, and 6864 be declared unconstitutional, void and a nullity by virtue of conflict with the First and Fourteenth Amendments to the United States Constitution;

3. That defendant, his agents, representatives, alternates, successors and anyone connected therewith be enjoined from directly or indirectly enforcing California Elections Code §§6830(c), 6831, 6833, and 6864 for the reasons mentioned above in paragraph "2";

4. That, upon plaintiff Hall's and plaintiff Tyner's tendering of the statutory filing fee and the presentation by them of a nomination petition signed by at least 18,000 electors qualified to vote in the State of California, defendant, his agents, representatives, alternates, successors, and anyone connected therewith, be enjoined from, directly or indirectly, refraining to certify plaintiffs Hall and Tyner as independent candidates for President and Vice President of the United States, respectively, and refraining from

placing the names of plaintiffs Hall and Tyner on the November 7, 1972 general election ballot as candidates for the abovementioned offices;

5. That, pending a full evidentiary hearing at which a permanent injunction will be sought, a preliminary injunction be issued granting plaintiffs the relief for which they pray in the immediately preceding paragraph (paragraph "4");

6. That plaintiffs be granted their costs in this suit;

7. That this Court grant such other and further relief as is just and proper in the premises.

Dated: August 11, 1972

Respectfully submitted,

Charles C. Marson

Peter E. Sheehan

By Charles C. Marson

Attorneys for Plaintiffs

Verification

State of California

City and County of San Francisco—ss.

Albert J. Lima, being duly sworn, deposes and says:

That he is one of the plaintiffs in the foregoing Complaint for Injunctive Relief; that he has read the complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information and belief, and as to those matters he believes it to be true.

Albert J. Lima

Subscribed and sworn to before me
this 11th day of August, 1972.

Pamela S. Ford, Notary Public

In and for the City and County of
San Francisco, State of California.

Charles C. Marson

Peter E. Sheehan

American Civil Liberties Union Foundation
of Northern California, Inc.

593 Market Street, Suite 227

San Francisco, California 94105

Telephone: 433-2750

Attorneys for Plaintiffs

In the United States District Court
for the Northern District of California

No. C-72-1468 WTS

Gus Hall, et al.,

Plaintiffs,

vs.

Edmund G. Brown, Jr.,

Defendant.

NOTICE OF REQUIREMENT OF THREE-JUDGE COURT

Pursuant to Rule 17(b) of this Court's Local Rules of Practice, plaintiffs hereby give notice that this action is required by 28 U.S.C., Section 2281 to be heard and determined by a district court of three judges, in that the action seeks to restrain the enforcement, operation and execution of state statutes for repugnance to the Constitution of the United States.

Dated: August 11, 1972

Respectfully submitted,

Charles C. Marson

Peter E. Sheehan

By Charles C. Marson

Attorneys for Plaintiffs

Charles C. Marson
 Peter E. Sheehan
 American Civil Liberties Union Foundation
 of Northern California, Inc.
 593 Market Street, Suite 227
 San Francisco, California 94105
 Telephone: 433-2750
 Attorneys for Plaintiffs

In the United States District Court
 for the Northern District of California

—
 No. C-72-1468 WTS
 —

Gus Hall, et al.,	} Plaintiffs,
vs.	
Edmund G. Brown, Jr.,	
	} Defendant.

NOTICE OF MOTION
 and
 MOTION FOR PRELIMINARY INJUNCTION
 To The Above-Named Defendant, And To The Gov-
 ernor And Attorney General Of The State Of
 California:

Please Take Notice that on September 8, 1972, at 10:00 A.M., in the Courtroom of the Honorable William T. Sweigert, United States District Judge, 450 Golden Gate Avenue, San Francisco, California, plaintiffs will move for a preliminary injunction en-

joining defendant, his agents, representatives, alternates, successors and anyone connected therewith from, directly or indirectly, enforcing California Elections Code §§66830(c) [sic—§6830(c)], 6831, 6833, and 6684 [sic—§6864]; and enjoining defendant, his agents, representatives, alternates, successors, and anyone connected therewith, from directly or indirectly, refraining to certify plaintiffs Hall and Tyner as independent candidates for President and Vice President of the United States, respectively, and refraining from placing the names of plaintiffs Hall and Tyner on the November 7, 1972 general election ballot as candidates for the abovementioned offices upon plaintiff Hall's and plaintiff Tyner's tendering of the statutory filing fee and the presentation by them of a nomination petition signed by at least 18,000 electors qualified to vote in the State of California.

Said Motion will be based upon this Notice and Motion, the Memorandum Re: Preliminary Injunction on file herein, and upon all of the pleadings and papers filed herein.

Dated: August 11, 1972

Respectfully submitted,

Charles C. Marson

Peter E. Sheehan

By Charles C. Marson

Attorneys for Plaintiffs

United States District Court
Northern District of California

No. C 72-1468 WTS

Gus Hall, et al.,

Plaintiffs,

vs.

Edmund G. Brown, Jr.,

Defendant.

[Filed August 16, 1972]

NOTICE RE CONVENING OF
THREE JUDGE COURT
(28 U.S.C. Sec. 2284)

It appearing to the court that the above-entitled action prays for an interlocutory and/or permanent injunction restraining the enforcement, operation and execution of a State statute, to wit: California Elections Code Secs. 6830(c), 6831, 6833, and 6864, upon the ground of the unconstitutionality of said statutes and that said action is one required by an Act of Congress, to wit: Title 28 U.S.C. Sec. 2281, to be heard and determined by a district court of three judges;

Now, Therefore, as provided by Title 28 U.S.C. Sec. 2284, the Chief Judge of the Ninth Circuit is hereby notified of such application.

No temporary restraining order has been applied for. An application for Preliminary Injunction has been noticed for September 8, 1972, at 10:00 A.M.

The Clerk of this court shall forthwith forward this notice as provided by Title 28 U.S.C. Sec. 2284.

Dated: August 16, 1972.

/s/ W. T. Sweigert

W. T. Sweigert

United States District Judge

United States District Court
for the Northern District of California

IN THE MATTER OF

C 72-1468 WTS

Gus Hall, et al. v. Edmund G. Brown, Jr.

C 72-978 RHS

Thomas Tone Storer, et al. v. Edmund G. Brown, et al.

[Filed Aug. 23, 1972]

REASSIGNMENT ORDER

(Assignment Plan (h) (3))

It appearing to the Assignment Committee that the above cases are related within the meaning of Rule 101 and that the earliest filed of said related cases, to wit, No. C 72-978 RHS has been assigned to Judge Robert H. Schnacke.

It Is Hereby Ordered that all of the above-entitled cases be reassigned to Judge Robert H. Schnacke for all further proceedings as provided by Assignment Plan (h)(3).

Dated: August 23, 1972

The Assignment Committee

By: Robert H. Schnacke Chief Judge

Evelle J. Younger, Attorney General
of the State of California

Iver E. Skjeie

Assistant Attorney General

Clayton P. Roche

Deputy Attorney General

6000 State Building

San Francisco, California 94102

Telephone: (415) 557-1586

Attorneys for Defendant

Secretary of State

United States District Court
Northern District of California

No. C-72-1468 RHS

Gus Hall, et al.,

Plaintiffs,

vs.

Edmund G. Brown, Jr.,

Defendant.

**DEFENDANT SECRETARY OF STATE'S
OPPOSITION TO
PRELIMINARY INJUNCTION
and
MOTION TO DISMISS THE ACTION
(Before Three-Judge Court)**

Defendant Secretary of State moves this Court to
dismiss the action on the following grounds:

1. The complaint fails to state a claim against the defendant upon which relief can be granted;
2. The plaintiffs are guilty of laches;
3. The complaint fails to join indispensable parties;
4. The plaintiffs lack standing to sue.

Defendant Secretary of State opposes the granting of a preliminary injunction on the same above-stated grounds and the additional grounds that:

1. A preliminary injunction should not be granted in that it would provide the ultimate relief requested; and
2. A preliminary injunction should not be granted in that in balancing the equities, nine million California voters have the right to an election undisrupted by eleventh-hour lawsuits.

Dated: August 25, 1972.

Respectfully submitted,
 Evelle J. Younger, Attorney General
 of the State of California

Iver E. Skjeie
 Assistant Attorney General

/s/ Clayton P. Roche
 Clayton P. Roche
 Deputy Attorney General
 Attorneys for Defendant
 Secretary of State

Evelle J. Younger, Attorney General
of the State of California

Iver E. Skjeie
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Attorneys for Defendant
Secretary of State

United States District Court
Northern District of California

No. C-72-1468 WTS

Gus Hall, et al.,

vs.

Edmund G. Brown, Jr.,

Plaintiffs,

Defendant.

NOTICE OF RELATED CASES
(L.R. 101)

To The Above-Entitled Court:

On August 17, 1972, the undersigned received the Court's "Notice Re Convening of Three Judge Court" in the above matter. The Secretary of State was also served in the above-entitled action on August 16, 1972, a copy of which was received today in San Francisco.

The above captioned case, filed August 11, 1972, *Gus Hall, et al. v. Edmund G. Brown, Jr.*, No. C-72-1468 WTS and assigned to Judge Sweigert, attempts to enjoin California Elections Code sections 6830(c), 6831, 6833 and 6864 on grounds of unconstitutionality; and

Thomas Tone Storer, et al. v. Edmund G. Brown, et al., No. C-72-978 RHS attempts to enjoin California Elections Code sections 6830(c) and (d), 6831, 6833 and 6864 on grounds of unconstitutionality. This latter action was filed May 30, 1972, and is set for hearing before a Three Judge Court (Judges Schnacke, Hamlin and East) on August 31, 1972.

These are related cases. Both cases, which were filed by the same attorneys, raise substantially the same constitutional issues.

Dated: August 18, 1972.

Respectfully submitted,
Evelle J. Younger, Attorney General
for the State of California
Iver E. Skjeie
Assistant Attorney General
/s/ Clayton P. Roche
Clayton P. Roche
Deputy Attorney General
Attorneys for Defendant
Secretary of State

Laurence H. Frommhagen

In Propria Persona

P.O. Box 326

Soquel, California 95073

John R. Stevens, Jr.

Wendy R. Stevens

In Propria Persona

5748 Old San Jose Road

Santa Cruz, California 95060

Jeanne Tarr

In Propria Persona

5192 Old San Jose Road

Santa Cruz, California 95060

Mary Prochnow

In Propria Persona

5020 Garnett Street

Capitola, California 95010

Charles W. Mercer

In Propria Persona

219 Claudius Drive

Aptos, California 95003

United States District Court
for the Northern District of California
No. C - 72 - 978 - AJZ

Thomas Tone Storer, as independent
candidate for Congress, in the Sixth
Congressional District,

and

Elizabeth Johnson, Salle S. Soladay,
Robert Fracchia and Philip Drath,
as supporters of Plaintiff Thomas
Tone Storer,

Plaintiffs,

Laurence H. Frommhagen, as inde-
pendent candidate for Congress in
the Twelfth Congressional District,

and

John R. Stevens, Wendy R. Stevens,
Jeanne Tarr, Mary Prochnow and
Charles W. Mercer, as supporters of
Plaintiff Laurence H. Frommhagen,
Proposed Plaintiffs,

vs.

Edmund G. Brown, Jr., as the Secre-
tary of State of the State of Cali-
fornia and George H. Gness, as
County Clerk for the County of
Marin, State of California,

Defendants,

Tom M. Kelley, as County Clerk for
the County of Santa Cruz, State of
California,

Proposed Defendant.

NOTICE OF MOTION
MOTION FOR INTERVENTION
OF PLAINTIFFS

Notice of Motion

To the attorneys for the defendants and proposed defendant:

Please Take Notice that the above-named proposed plaintiffs will make the following motion at 1:30 P.M. on Tuesday, June 27, 1972, before the Honorable Alfonso J. Zirpoli, Judge Presiding, at the United States Court House, 450 Golden Gate Avenue, San Francisco, California 94102.

* * * * *

Motion For Intervention of Plaintiffs

The above-named proposed plaintiffs respectfully request this Court to enter an order approving the intervention by the proposed plaintiffs, pursuant to Rule 24(b) of the Federal Rules of Civil Procedure, in the instant action.

The applicants' claims and the main action have a question of law in common, and this intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

The proposed plaintiffs hereinafter plead the claim for which intervention is sought.

I.

Applicants reallege and incorporate by reference the claim as to the jurisdiction of this Court in paragraph 1 of the Complaint in *Storer et al. v. Brown et al.* No. C-72-978-AJZ, United States District Court for the Northern District of California.

II.

Plaintiff Laurence H. Frommhagen who is over the age of 25 years and is a resident in the Twelfth Congressional District, is a registered voter, unaffiliated with a political party. Plaintiff Frommhagen is a candidate for the United States Congress, Twelfth Congressional District, as an independent, in the November 7, 1972, general election and wishes to appear on that election ballot and be so designated.

Plaintiff Frommhagen, whose roots were those of a liberal member of the Republican Party, was a registered Republican and an advisor to Ronald Reagan during the election of 1966. He was so disappointed by the positions and mediocre performance of Governor Reagan and by Reagan's conservative polarization of the Republican Party (just as he has recently been disillusioned by the radical polarization of the Democratic Party) that he changed his political affiliation to that of the Democratic Party in 1969 and, in March of this year, changed his registration to "decline to state."

Frommhagen has been a consultant to the California Legislature and the United States Congress in the areas of public health and space sciences, and in that role, has been critical of the fiscal excesses, disordered priorities, and uneven performance in those activities of the state and federal governments. During the past several years he has become increasingly distressed by the quality of political leadership in the United States, by the domination of the Republican and Democratic Parties by corporate and labor money

interests, and by a dangerous drift of the United States into a parafascist state permitted and encouraged by both major parties. Frommhagen is convinced that the only way that the United States will survive as a democracy is for many more citizens to become involved, not for political gain, but from a high sense of objectivity and compassion in the affairs of their country at every level of its government. See Exhibit 1.

III.

Applicants propose to designate as an additional defendant in this action Tom M. Kelley, who is, and at all relevant times mentioned herein was, the duly elected County Clerk of the County of Santa Cruz. Said proposed defendant, at all times relevant to this action, has had the duty of certifying candidates for the United States Congress, Twelfth Congressional District, in the general election of November 7, 1972, and of performing all official acts enabling qualified persons to appear on the ballot in the said election.

IV.

The following plaintiffs, supporters of plaintiff Frommhagen, are each and everyone citizens of the United States and are registered voters in the Twelfth Congressional District. They all wish to exercise their right of association and political involvement by actively supporting Frommhagen's candidacy for Congress, by signing Frommhagen's nominating papers, and by voting for him in the November 1972 election. However, they all intend to vote in the June

6, 1972, primary election, but will all refrain from voting for a candidate to the United States Congress.

John R. Stevens is a registered member of the Republican Party in the Twelfth Congressional District.

Wendy R. Stevens is a registered member of the Democratic Party in the Twelfth Congressional District.

Jeanne Tarr is a registered member of the Democratic Party in the Twelfth Congressional District, but, in the past, has been a registered voter unaffiliated with any party.

Mary Prochnow is a registered member of the Democratic Party in the Twelfth Congressional District.

Charles W. Mercer is a registered voter, presently affiliated with the Democratic Party, but affiliated with the Republican Party previous to 1969.

V.

Plaintiff Frommhagen, as to his person and as to his interests, realleges and incorporates by reference paragraph X. of the Complaint in the instant action. In the manner described in said paragraph he is prohibited from appearing on the general election ballot as an independent candidate for Congress.

VI.

Plaintiffs John R. Stevens, Wendy R. Stevens, Jeanne Tarr, Mary Prochnow, and Charles W. Mer-

cer will be foreclosed from signing nomination papers for plaintiff Frommhagen for the reasons shown in paragraph XII. of the Complaint in this action.

The aforementioned plaintiffs reallege and incorporate by reference paragraphs XIII. and XIV. of the Complaint in this action.

VII.

Unless restrained by this Court the defendants and the proposed defendant will deny plaintiff Frommhagen a place on the ballot as an independent candidate in the election of November 7, 1972, for the reasons shown in paragraph XV. of the Complaint in this action.

VIII.

Unless restrained by this Court, the defendants, by requiring plaintiff Frommhagen to comply with the California statutory scheme for independent candidates, will deprive plaintiffs John Stevens, Wendy Stevens, Tarr, Prochnow, and Mercer of the opportunity to vote and participate actively in the political processes on a equal basis as shown in paragraph XVI. of the Complaint in this action.

IX.

Applicants, and each of them, reallege and incorporate by reference paragraph XVII. of the Complaint in this action.

For a Second and Distinct Cause of Action, applicants incorporate by reference paragraphs I through VI. of this pleading and further allege as follows:

X.

Plaintiff Frommhagen is absolutely prohibited from appearing on the November 1972 general election ballot as a candidate for Representative to the United States Congress because he has been affiliated within the past year with the Democratic Party and if he votes, as he intends to do, in the June 6, 1972, primary election. Paragraph XVIII. of the Complaint in this action is incorporated by reference.

XI.

Applicants reallege and incorporate by reference paragraph XIX. of the Complaint in this action and reassert that the addition of qualifications for Representative to the United States Congress by provisions of the California Elections Code is in violation of the rights secured to applicants by the United States Constitution.

XII.

Wherefore, applicants pray as shown in paragraph XXI. of the Complaint in this action in regard to their own persons and to their own interests, and respectfully request that those provisions of the California Elections Code, specified in the Complaint in this action, which prohibit plaintiff Frommhagen from appearing on the November 1972 ballot as an independent candidate for Congress be declared by this Court to be unconstitutional and that the defendants be enjoined from, directly or indirectly, refraining to certify plaintiff Frommhagen as a candidate for United States Representative in the Twelfth Con-

gressional District in the State of California. Applicants further pray that a three-judge court be convened to hear and determine this controversy, that they as plaintiffs be granted their costs in this suit, and that this Court grant such other and further relief as is just and proper.

Dated: June 4, 1972.

/s/ Laurence H. Frommhagen
Laurence H. Frommhagen

/s/ John R. Stevens, Jr.
John R. Stevens, Jr.

/s/ Wendy R. Stevens
Wendy R. Stevens

/s/ Jeanne Tarr
Jeanne Tarr

/s/ Mary Prochnow
Mary Prochnow

/s/ Charles W. Mercer
Charles W. Mercer

Subscribed and sworn to before me by Laurence H. Frommhagen, this 5th day of June, 1972,

(Seal) /s/ Marion J. Knight

Notary Public in and for the State of California
and the County of Santa Cruz

My Commission Expires July 10, 1974

Certificate of Service

The undersigned does hereby certify that he personally delivered copies of the foregoing Notice of

Motion and Motion for Intervention of Plaintiffs to (1) the office of the California Attorney General, 6000 State Building, San Francisco, California and (2) the office of the County Counsel, County of Santa Cruz, County Governmental Center, Santa Cruz, California, on June 5, 1972. The undersigned additionally sent by mail a copy of the said document to the office of the County Counsel, County of Marin, Civic Center, San Rafael and to Charles C. Marson, attorney for plaintiffs, American Civil Liberties Union, 593 Market Street, Suite 227, San Francisco, California, on June 5, 1972.

**/s/ Laurence H. Frommhagen
Laurence H. Frommhagen**

United States District Court
For the Northern District of California

No. C - 72 - 978 - AJZ

Thomas Tone Storer, Elizabeth Johnson, Salle S. Soladay, Robert Frachia, and Philip Drath,

Plaintiffs,

vs.

Edmund G. Brown, Jr., Secretary of State of the State of California and George H. Gnos, County Clerk for the County of Marin,

Defendants.

ORDER

The Motion For Intervention Of Plaintiffs by applicants Laurence H. Frommhagen, John R. Stevens, Jr., Wendy R. Stevens, Jeanne Tarr, Mary Prochnow, and Charles W. Mercer having come on for hearing this day of , 1972, all parties having been fully apprised of this motion, and the motion having been fully considered,

It Is Hereby Ordered that the aforementioned applicants be joined as plaintiffs, and that Tom M. Kelley, County Clerk of the County of Santa Cruz be joined as defendant, in the above-entitled matter.

United States District Judge

Dated:

Exhibit 1

Watsonville Register-Pajaronian**Second Section****Wednesday, March 8, 1972**

Frommhagen seeking to run as independent

Larry Frommhagen, 42, of Soquel, announced yesterday he will seek a court decision to allow him to run against Rep. Burt Talcott, R-Salinas, as an "independent" candidate.

Frommhagen said he will challenge the constitutionality of the state elections code which prohibits a candidate running as an "independent", or one who refuses to state a party affiliation, if he has been affiliated with any political party 12 months before the June Primary.

Frommhagen, a consultant in land-development and scientific medical techniques, said he was registered as a Republican until 1969 when he switched to the Democratic party. "In the past week I have switched to the 'declined to state', and I have no party affiliation." He said he has become disenchanted with both parties.

He said he planned to ask superior court for injunctive relief from the restrictions of the election code.

Another aspect of the code he will challenge is the section which prevents anyone who votes in the June Primary partisan election from signing a petition

which would place his name on the general election ballot as an independent, Frommhagen said.

A similar suit is being filed in Marin county superior court by the American Civil Liberties Union on behalf of Mark Storer, an "independent" candidate in the Sixth Congressional District, Frommhagen said.

It would take 7,000 signatures to put his name on the ballot here in the 12th Congressional district, Frommhagen said.

Frommhagen described himself as a "mixture of social progressive and fiscal conservative."

Frommhagen, his wife, Joan and their daughter, Ann, 6, live at 5059 Old San Jose Road. He has been a resident of Santa Cruz county for three years. His parents are the Rev. and Mrs. Frederick Frommhagen of La Selva Beach.

**In the United States District Court for the
Northern District of California**

C-72-978 RHS

Thomas T. Storer, et al.,	Plaintiffs,
Laurence H. Frommhagen, et al.,	
Plaintiff-Intervenors,	
vs.	
Edmund G. Brown, Jr., et al.,	
	Defendants,
Tom M. Kelley,	
Defendant-Intervenor.	

[[Filed Jul. 20, 1972]]

**ORDER GRANTING LEAVE
TO INTERVENE**

Good cause appearing therefor, it is ordered that Laurence H. Frommhagen is hereby granted leave to intervene as a party plaintiff in the above entitled action.

Dated: July 17, 1972

**/s/ Robert H. Schnacke
Robert H. Schnacke
United States District Judge**

Laurence H. Frommhagen

In Propria Persona

P. O. Box 326

Soquel, California 95073

Telephone: 408/475-9746

United States District Court

For the Northern District of California

No. C - 72 - 978

Thomas Tone Storer, et al.,

Laurence H. Frommhagen, et al.,

Plaintiffs,

vs.

Edmund G. Brown, Jr.,

Tom M. Kelley, et al.,

Defendants.

NOTICE OF MOTION

and

MOTION FOR PRELIMINARY INJUNCTION

To the Attorneys for the Defendants:

Please Take Notice that on August 31, 1972, at 2:00 P.M., or as soon thereafter as counsel can be heard, in Courtroom No. 5 at 450 Golden Gate Avenue, San Francisco, California, plaintiff Frommhagen and co-plaintiffs will move for an order preliminarily enjoining defendants, and each of them, their agents, representatives, alternates, successors,

and anyone connected therewith, from, directly or indirectly, refraining to certify plaintiff Frommhagen as a candidate for United States Representative in California's Twelfth Congressional District and refraining from placing plaintiff Frommhagen's name on the November 7, 1972 general election ballot as a candidate for United States Representative in the Twelfth Congressional District upon plaintiff's Frommhagen's tendering of the statutory filing fee and the presentation by him of a nomination petition signed by at least 40 electors qualified to vote in the Twelfth Congressional District.

Said Motion will be based upon this Notice and Motion, the Memorandum of Points and Authorities filed by the attorneys for plaintiff Storer, and upon all of the pleadings and papers filed herein.

Dated: August 4, 1972.

/s/ Laurence H. Frommhagen
Laurence H. Frommhagen

Certificate of Service

The undersigned does hereby certify that he mailed copies of the foregoing Notice of Motion and Motion for Preliminary Injunction to Charles C. Marson, 593 Market Street, San Francisco, California 94105, to the Office of the California Attorney General, 6000 State Building, San Francisco, California 94102, and to the Office of the General Counsel, County of Santa Cruz, Santa Cruz County Governmental Center, Santa Cruz, California 95060, on August 4, 1972.

Laurence H. Frommhagen

In Propria Persona

P. O. Box 326

Soquel, California 95073

Telephone: 408/475-9746

United States District Court
For the Northern District of California

No. C - 72 - 978 - RHS

Thomas Tone Storer, et al.,

Laurence H. Frommhagen, et al.,

Plaintiffs,

vs.

Edmund G. Brown, Jr.,

Tom M. Kelley, et al.,

Defendants.

**PLAINTIFF'S RESPONSE TO DEFENDANT'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO
GRANTING OF PRELIMINARY INJUNCTION
AND IN SUPPORT OF SECRETARY OF
STATE'S MOTION TO DISMISS THE ACTION**

This plaintiff is in receipt of defendant's Memorandum Of Points And Authorities In Opposition To Granting Of Preliminary Injunction And In Support Of Secretary Of State's Motion To Dismiss The Action, dated August 18, 1972, the letter of Clayton

P. Roche to the Court, dated August 10, 1972, and the letter of Charles C. Marson to the Court, dated August 21, 1972.

This plaintiff concurs with Mr. Marson in regard to Mr. Roche's complaint in his letter to the Court of August 10, 1972 that he had too little time in which to respond to plaintiffs' motion and points and authorities. It is abundantly clear from defendant's motion and the points and authorities in support thereof and in opposition to plaintiffs' motion, that Mr. Roche had abundant time and previous experience.

Defendant's assertion that this action is barred by laches is also reduced to inconsequentiality by Mr. Marson's showing in his letter to the Court of August 21, 1972, that there is sufficient time for the Court to grant relief before September 8, 1972, the last day to file independent nomination papers. This plaintiff has also been informed by officials in the Twelfth Congressional District that the ballot will not actually be printed until sometime in October. The printing of an additional name would present no great difficulty or expense.

Defendant should not be permitted to quash with the defense of laches the long-overdue determination on the merits of the issues in this Action. Nor should the defendant's representations as to the great complexities of the issues be allowed to prevail; the issues, though important, are not that complex. Deficient also is the argument that the Legislature should be permitted to act, particularly in view of the

sorry record of the past session of the Legislature. According to the understanding of this plaintiff no attempt was made in the previous session of the Legislature to review the independent nomination procedure. There is every reason to believe that the two major parties, faced as they are with the growing defection of many voters to the ranks of the independent (see Exhibit A), have no motivation to overhaul the independent nomination procedures.

In the Opposition to plaintiffs' motion the defendant Secretary of State speaks at length about the burden placed upon the State by the addition of those with frivolous motives to the ballot. Plaintiff submits that the statutory filing fee of nearly five hundred dollars is sufficient to discourage all but a very few of the frivolous. In addition, as this Court stated in *Fagg v. Sullivan*, C- 70 971- ACW (pages 3 and 4 of the Order Denying Motion For Summary Judgment And Dismissing Action—see Exhibit C of defendant's Memorandum Of Points And Authorities in this Action) there is reason to believe from the experience of states with more equitable independent nomination procedures that those procedures have not been abused and 'laundry-list' ballots have not accrued.

The central issue in this action, as it appears to this plaintiff, is that of "party loyalty." It is submitted that those who are genuinely disenchanted with a party, such as Storer and Frommhagen, should not be penalized by a 12-month period, which in these times of rapid change and pressing issues, is much too lengthy. Both Storer and Frommhagen an-

nounced their defection from the Democratic Party in the early Spring of this year. In analogy to the residency requirements for voting, which is now but thirty days, individuals of genuine principle, whose filing fee certainly reduces the burden on the State, should be free to ask for the support of their fellow citizens via a printed name on the ballot.

Defendant's contention that the write-in procedure is an acceptable alternative is fallacious on at least two scores. First of all, the psychological and physical handicap involved in the writing of names on the ballot, particularly with a name like Frommhagen, is well known and widely accepted. Secondly the writing-in of names on ballots itself presents a burden on the State which is in excess of the mechanical and computer countings of voter preferences for printed names.

A 'laundry-list' ballot, which this plaintiff denies would occur, should not dismay for it would signify a very welcome involvement by a greater number of persons in the political process. The viability and vitality of our form of government is absolutely dependent upon such involvement. Plaintiff is assured that the few names that would be added to the ballot; or even a 'laundry-list ballot' could be handled by the electorate in their wisdom and by the procedures and computers now available for the counting of the ballot.

At a time when the body politic is expressing far greater independence (see Exhibit A) and greater distrust of the established parties it ill behooves the

State to insist upon a doctrine of "party loyalty." The Secretary of State is suspect in that regard.

Defendant's contention that this Action is defective because the present nominees of the political parties in the Sixth and Twelfth Congressional Districts have not been joined as parties to this Action, is defeated by the very fact that said nominees, despite substantial publicity concerning this case in both of the Congressional Districts, have not sought intervention or, to the knowledge of this plaintiff, expressed any public opposition to the relief sought in this Action.

This plaintiff is particularly aroused, as are his supporters, by Section 6830(c) of the California Elections Code which has the effect of preventing persons registered with a political party from either supporting those of their party at the primary election for offices other than the one pursued by the independent candidate of their choice, or of being unable to sign the nomination papers of their independent candidate. Surely the electorate has the right to 'split' the ticket at the primary between those of their own party and those of no party.

Plaintiff is gratified by defendant's position that one who has voted in the 'decline-to-state' primary may run as an independent candidate in the following general election. Plaintiff expresses the hope the Court will comment upon this matter in its Opinion.

Dated: August 23, 1972.

/s/ Laurence H. Frommhagen
Laurence H. Frommhagen

Certificate of Service

The undersigned does hereby certify that he personally delivered copies of the foregoing Plaintiff's Response to Defendant's Memorandum of Points and Authorities, to the Office of California Attorney General, 6000 State Building, att: Clayton P. Roche, San Francisco, California 94102 and to the Office of the County Counsel, County of Santa Cruz Governmental Center, Santa Cruz, California 95060 on August 24, 1972. On that date copies were also mailed to Charles C. Marson, 593 Market Street, San Francisco, California 94105 and to the Office of the County Counsel, County of Marin, San Rafael, California.

/s/ Laurence H. Frommhamen
Laurence H. Frommhamen

Exhibit A

Santa Cruz Sentinel**SUNDAY MORNING—MARCH 26, 1972****117th Year No. 72****54 Pages 15c****The Decline And Fall Of The Two-Party System****By JOHN S. LANG****Associated Press Writer**

WASHINGTON (AP) — America's two-party system is sick and likely dying of self-inflicted wounds, the result of a suicidal struggle between ideological twins for the same votes.

That is the belief, and growing concern, among the men who know the illness best, the backroom professionals who pull the party strings.

Political professionals view the causes as rooted in the failure of both the Republican and Democratic parties to solve the problems of war, poverty and racial enmity, and to offer true alternatives while seeking power from the same, broad middle ground of American society.

The visible consequence of ignoring the political perimeter is the diminishing number of Americans who identify themselves with either major party. A still later development is the growth of splinter parties on the left and right, and the first stirrings toward a coalition of these seemingly incompatible forces.

The common ground they share is an old-fashioned populism; programs that, in effect, demand a redistribution of wealth.

In their darkest visions, politicians, historians and political scientists see the possibility of the United States entering a situation similiar to that of France after World War II and Italy today, with neither major party able to command broad public support, and government turned over to coalitions which collapse in the face of every crisis.

The challenge comes from 25 million American voters—20 per cent of the electorate—who are refusing to give allegiance to either national party.

While still trailing far behind the Democrats, the number of independents rivals the 38 million who, according to a recent Gallup poll, would register as Republicans today.

Significantly, this independent sector has increased from 6.2 million in 1960. And it is that trend over a long term which frightens party politicians.

"It all goes basically to the fact people don't think too much of us so-called politicians," says Leonard W. Hall, longtime power in the Republican party and National Chairman

(Continued on Page 2)

Laurence H. Frommhagen

In Propria Persona

P.O. Box 326

Soquel, California 95073

Telephone: 408/476-5660

United States District Court
for the Northern District of California

—
No. C - 72 - 978 - RHS
—

Thomas T. Storer, et al., Laurence H. Fromm-
hagen, et al.,

Plaintiffs,

vs.

Edmund G. Brown, Jr., Tom M. Kelley, et al.,

Defendants.

**PLAINTIFF'S WRITTEN REBUTTAL TO
ORAL ARGUMENTS BY COUNSEL FOR
DEFENDANT-IN-INTERVENTION**

This plaintiff attempted strenuously to obtain the attention of the Court at the conclusion of the hearing in this matter on August 31, 1972, for the purpose of requesting permission to make a short rebuttal to opposing counsel's arguments; plaintiff did not succeed. Hereupon plaintiff respectfully requests the Court to take judicial notice of the following rebuttal arguments.

1. It should be noted that no appearance was made by counsel for Tom M. Kelley, defendant-in-intervention. On September 1, 1972, Howard E. Gawthrop, County Counsel of the County of Santa Cruz, California, advised this plaintiff during a personal discussion that the representation of Tom M. Kelley, County Clerk of the County of Santa Cruz, California, had been officially delegated to the Office of the California Attorney General. In the memory of plaintiff, Clayton P. Roche has not informed the Court that he is representing Tom M. Kelley, together with Edmund G. Brown, Jr., in this Action before this Court. By copy of this submission to the office of the California Attorney General, Clayton P. Roche is requested to so inform the Court by filing in this action a notice of his appearance for Tom M. Kelley.

2. While it must be conceded that the Constitution does not specifically guarantee an independent a place on the ballot, neither does the Constitution forbid such a place on the ballot. In point of fact, the Fourteenth Amendment to the United States Constitution does forbid an independent nomination procedure so invidiously complex and restrictive as to make it vastly more difficult for an independent to win a place on the ballot than a member of the party system.

This plaintiff does not quarrel with the number of signatures necessary to qualify an independent candidate, but rather he takes issue with the other provisions of the Election Code (the one year registration as an independent, the exclusion of those who vote at the primary, and the very short period of time

to collect the signatures and to verify them) which make it practically impossible to obtain the requisite number of signatures, whether 5%, 1%, or less.

3. Opposing counsel's argument that Frommhagen could qualify by forming his own party is completely untenable when measured against the facts (1) that Frommhagen doesn't want to form another party; his appeal and thrust is in the direction of those who are sick of politics and politicians, and (2) that he would have to generate a statewide party amounting to not less than 1% of those who voted at the last general election, just to be able to run in the Twelfth Congressional District. Indeed he would have to register several times more voters than in the Twelfth Congressional District.

4. In order to provide for a high rate of disqualification due to the provision that those who vote at the primary are excluded for signing the independent's nomination papers, it would be necessary for an independent to obtain not 5%, but rather 7 to 8%. It might be speculated that if the disqualification rate was less than anticipated the independent's nomination papers would exceed 6% and he would be disqualified by reason of the 6% maximum in Section 6831 of the Elections Code.

5. This plaintiff wishes to reemphasize his argument that the write-in procedure is considerably more burdensome upon the state and upon its citizens than would be a less restrictive independent nomination procedure, as well as Mr. Halvonik's oral argument that the certification of the names on the nomination

papers would be extremely burdensome on the elections offices, particularly within the five day limit prescribed by law. Indeed the latter could be impossible under certain circumstances.

The time periods for gathering signatures and verifying them are prohibitively short and are discriminatory when referenced against those time periods allowed for party nominations, party certifications to the ballot, referendums, and initiatives.

6. As to those propositions which lie just beneath the surface of certain of the opposing arguments to the effect that only those who belong to a party can hope to win a election and that independents are eccentrics, frivolous, or both, let it be noted that the United States Constitution and the heritage of this country protects the 'normal' as well as the eccentric. It cannot be denied that eccentrics are often at the forefront of human progress because they are willing to stand alone in behalf of their convictions.

Respectfully submitted,

/s/ Laurence H. Frommhagen
Laurence H. Frommhagen

Dated: September 4, 1972.

Certificate of Service

The undersigned does hereby certify that he mailed fully conformed copies of the foregoing Plaintiff's Written Rebuttal to Oral Arguments by Counsel for Defendant-In-Intervention on September 5, 1972, to (1) the Office of the California Attorney General, att: Clayton P. Roche, 6000 State Building, San Francisco, California 94102, (2) the Office of the County Counsel, att: Howard E. Gawthrop, County Governmental Center, Santa Cruz, California 95060, and (3) the Offices of the counsels for plaintiff Storer, att: Charles C. Marson, 593 Market Street, San Francisco, California 94105 and Paul N. Halvonik, 680 Beach Street, Suite 436, San Francisco, California 94109.

In the United States District Court for the
Northern District of California

Thomas T. Storer, et al.,

Plaintiffs,

vs.

Edmund G. Brown, Jr., et al.,

Defendants.

C-72-978

Gus Hall, et al.,

Plaintiffs,

vs.

Edmund G. Brown, Jr., et al.,

Defendants.

C-72-1468

[Filed September 8, 1972]

OPINION AND ORDER

The above cases, though not identical as to parties and presenting slightly different contentions, or the same contentions in slightly different contexts, present, in the view of the Court, substantially the same ultimate issues and require only a single opinion.¹ Both cases turn in the final analysis on the Constitutionality of Division 5, Chapter 3, comprising §§6800

¹*Storer*, in which plaintiffs are potential candidates for the office of Representative in Congress and certain of their alleged supporters, was commenced first, had passed through the stages of designation of a three-judge District Court pursuant to 28 U.S.C. §2284 and plaintiff's motion for a preliminary injunction and defendants' motion to dismiss were set for hearing when *Hall* was filed on behalf of a potential candidate for President of the United

through 6290, of the California Elections Code, providing a procedure for so-called Independent nominations by which a candidate for any public office not nominated in the party primaries may obtain a place on the ballot as an Independent candidate. Plaintiff Storer and plaintiff-intervenor Frommhagen, not having been nominated in their party primaries as candidates for Representative in Congress for their respective districts and plaintiff Hall, not having been nominated in the presidential primary for President of the United States, allege that they wish to appear as candidates for such offices as Independent, but are effectively barred from doing so by various provisions of the statutes referred to above, especially §§6830(c) and (d) (which disqualify persons who voted at the immediately preceding primary election from being either candidates or signers of a candidate's nomination papers for Independent status and also disqualify a person registered as a party member for one year preceding the immediately preceding primary from being a candidate in an Independent capacity); 6831 (requiring the signatures on nomination papers for Independent candidates of 5 to 6% of the entire vote in the district in the preceding general election—alleged to require some 9,500 signatures in the district Storer seeks to represent and state on an

States. By appropriate orders and stipulations, although the cases were never consolidated, the parties to *Hall* will be bound by the rulings made in *Storer* which are common to both cases and any separate issues in *Hall* stand submitted without further briefing or oral argument. The view taken by the Court herein is such that there are no separate issues in *Hall* and the rulings expressed are dispositive of both cases. Unless otherwise indicated, all statutory references are to the California Elections Code.

exhibit to the complaint in intervention to require some 7,500 signatures in the case of Frommshagen) and 6833 (allowing only 24 days within which to prepare, file and lodge Independent nomination papers). Storer alleges that he is over the Constitutionally required age of 25, is a registered voter, presently unaffiliated with any political party, though previously a registered Democrat for many years prior to January, 1972 when he switched his registration to "Decline to State". He intends, however, as the law allows, to vote in the June 6, 1972 primary on non-partisan matters (The complaint, filed in May, 1972, necessarily limits the plaintiffs to a statement of their intentions with respect thereto.) Johnson intends likewise to vote on non-partisan matters but not to vote for a Democratic candidate for Representative in Congress. Fracchia and Drath intend to vote on all matters they are entitled to by virtue of their Democratic registration, including nomination of a Representative in Congress. All the four plaintiffs mentioned above, however, desire to sign Independent nomination papers for Storer.

As the foregoing summary of the relevant statutes shows, Storer will be barred from Independent candidacy by §6830(c) if he carried out his stated intention of voting on non-partisan matters in the June primary and by §6830(c) and (d) by virtue of his prior Democratic registration, and all plaintiffs mentioned above will be barred from signing Storer's nomination papers by §6830(c).

In addition, all plaintiffs complain of the large signature requirements of §6831 and the short time to meet them afforded by §6833.

Plaintiff-intervenor Frommhagen alleges his age qualification, his change of registration from Republican to Democrat in 1969 and from Democrat to "Decline to State" in March 1972.

The other five plaintiffs in intervention joining Frommhagen are all barred, contrary to their wishes, from signing Independent nomination papers for Frommhagen as registered members of either the Republican or Democratic party, by virtue of §6830(c).

In *Hall*, plaintiff alleges membership in the Communist Party of the United States, which has not qualified under the requirements of §6430; as mentioned above, he seeks to be a candidate for President of the United States and is otherwise allegedly qualified for the office, but can do so only under the Independent nomination procedure. Like allegations are made as to plaintiff Tyner, who seeks the Vice Presidency. Plaintiff Wilkinson is registered as a Democrat; plaintiff Lima is a registered Communist; and plaintiffs Lopez and Graham are registered as affiliated with La Raza Unida Party.

The plaintiffs in *Hall* advance virtually the same objections as are advanced in *Storer*; the signature requirements of §6831, the short time periods afforded by §§6833 and 6864 and the qualification of signers provided by §6830(c). For obvious reasons, they do not attack the prohibition on candidacy made by

§6830(d), since the proposed candidates are not members of a qualified political party.

California affords candidates at least four paths to partisan office; while some may be smoother than others, they are nevertheless open: (1) obtaining the nomination of one of the established parties in a regular direct party primary (Division 5, Chapters 1 and 2); (2) the formation and qualifications of a new party and obtaining its nomination (§6430), the requirements for which were upheld in *Christian Nationalist Party v. Jordan*, 49 C.2d 448 (1957); *Socialist Party, U.S.A. v. Jordan*, 49 C.2d 864 (1957), *certiorari denied*, 356 U.S. 952 (1957); (3) the Independent nomination procedure here involved; (4) the write-in procedure afforded in both the primary and general elections by §§10213, 10228, 10292, 10317, and 14412.

It cannot be said, in view of the foregoing, that any individual wishing to pursue a political career lacks ample opportunity to do so nor that individual voters are not afforded an adequate opportunity to vote for candidates of their choice. While a state may not create a situation in which parties are *de facto* restricted to the old established parties, Republican and Democratic, *Williams v. Rhodes*, 393 U.S. 23 (1968), this is certainly not true in California; we are advised without dispute that at present four parties enjoy official recognition on the California ballot. Thus, the basic freedoms guaranteed by the First and Fourteenth Amendments and invoked by plaintiffs here are satisfied. *Jennes v. Fortson*, 403 U.S. 431 (1971).

Legislatures of the respective states have broad powers, granted by Article I, Section 4 and Article II, Section 1 of the Constitution itself, to regulate the conduct of elections for Senators and Representatives and for electors for President and Vice President. While such power is not unlimited, *Williams v. Rhodes, supra; N.A.A.C.P. v. Button*, 371 U.S. 415 (1963), restrictions upon candidacy are subject only to a showing of legitimate state interest reasonably carried out.

The California statutes in question here are obviously designed to make it difficult to create, if not in fact to prevent, the confusion which would result from the unfettered ability of candidates and voters to skip freely from one party affiliation to another or to disavow previous party affiliations on short notice and strike out on their own as plaintiffs seek to do here. The prevention of such confusion is a legitimate objective. *Bendinger v. Ogilvie*, 335 F.Supp. 572 (N.D. Ill. 1971, three-judge court). There is no Constitutional prohibition, therefore, against legislation which, to this end, imposes more onerous requirements upon candidates and voters seeking to engage in "party hopping". *Jackson v. Ogilvie*, 325 F.Supp. 864 (N.D. Ill. 1971, three-judge court, one judge dissenting), *affirmed*, 403 U.S. 925 (1971).

Inasmuch as the foregoing principles are well-settled and the special requirements for Independent nomination in California attacked in these cases fall well within them, plaintiffs have failed to state a claim upon which relief can be granted. Requirements and

restrictions closely similar to those here attacked have been upheld against attack on virtually the same grounds advanced here. Cf. *Bendinger v. Ogilvie, supra*, (disqualification of candidates affiliated with another party within prior two years—compare §6830 (c), (d); *Jackson v. Ogilvie, supra*, (disqualification as signers of nomination papers of those voting in preceding primary—compare §6830(c)); *Moore v. Board of Electors*, 319 F.Supp. 437 (D.D.C. 1970, three-judge court) (additional signatures and more limited time periods for Independent candidates—compare §§6831 and 6833).

The long and short of it is that the California Legislature, like those of many if not most states, has determined that the orderly functioning of the electoral process is best served by promoting party loyalty to one of a reasonable number of qualified parties with which the candidate or voter has established and maintained his affiliation for a reasonable period of time and, as said above, to discourage the confusion necessarily attendant upon a proliferation of candidates and a “laundry list” ballot.² These objectives are clearly permissible under the First and Fourteenth Amendments, and the requirements here attacked do not transcend the permissible means of achieving such objectives.

²A reasonable argument can be made that as a result of the number of qualified parties, the large number of special quasi-municipal districts authorized by law and requiring voter approval for certain types of action, all taken together with the California-adopted Populist practices of initiative, referendum and recall, the California ballot is already far too long for the average intelligent voter to cope with; this Court would be most loath to lengthen it, as is the Legislature.

For the foregoing reasons, the defendants' motions to dismiss in each of the above cases are granted and the complaints and actions are dismissed.

Dated: September 8, 1972.

/s/ O. D. Hamlin
Senior United States Circuit Judge

/s/ Robert H. Schnacke
United States District Judge

3

³Hon. William G. East, Senior United States District Judge, the third member of the Court, has indicated his concurrence in the preceding Opinion and Order, although prevented by official duties elsewhere from affixing his signature.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1972

No.

THOMAS TONE STORER, et al., *Appellants*,

VS.

EDMUND G. BROWN, JR., et al., *Appellees*.

GUS HALL, et al., *Appellants*,

VS.

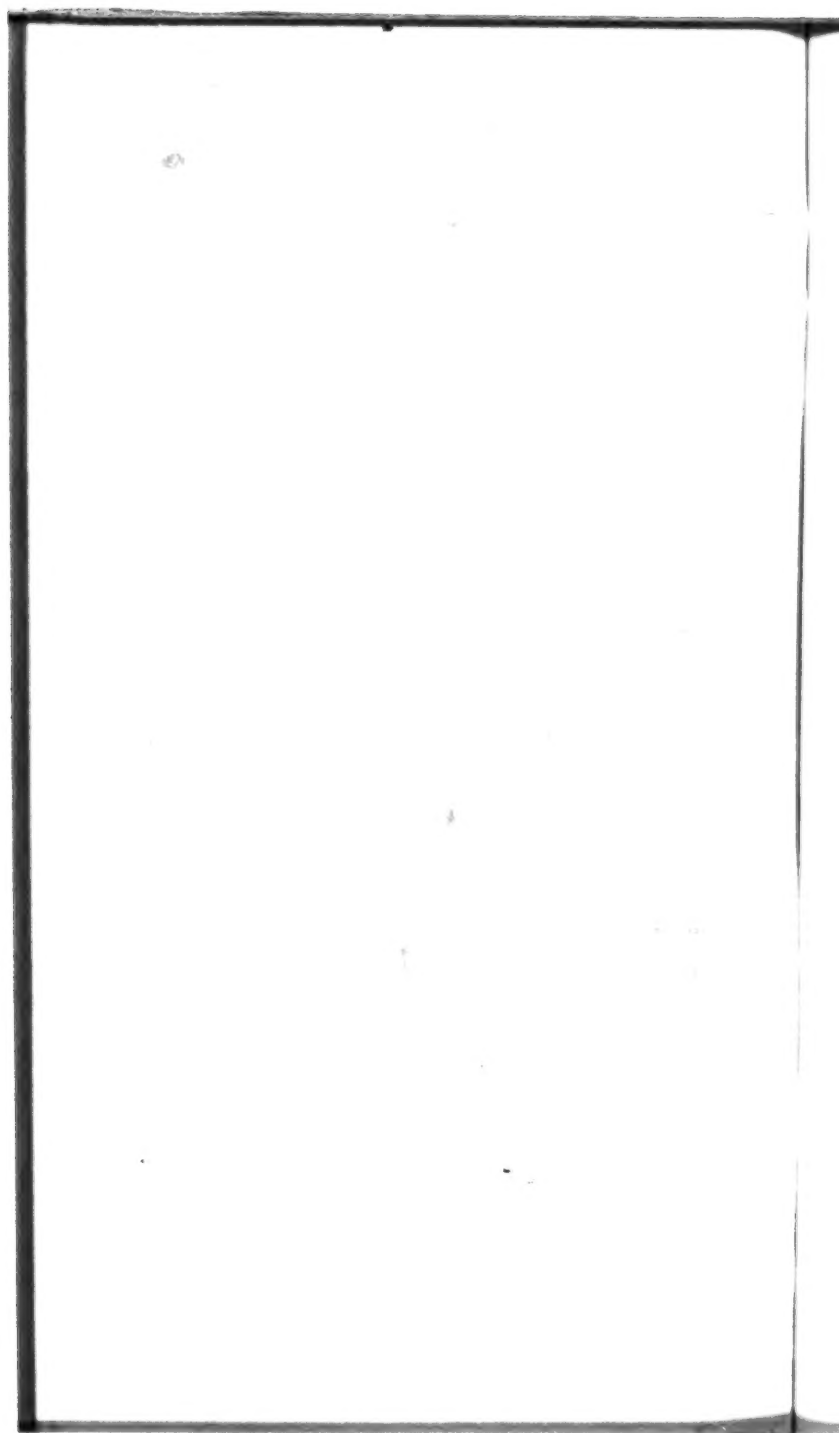
EDMUND G. BROWN, JR., *Appellee*.

On Appeal from the United States District Court
for the Northern District of California

JURISDICTIONAL STATEMENT

PAUL N. HALVONIK,
FRIEDMAN, SLOAN & HALVONIK,
680 Beach Street, Suite 436,
San Francisco, California 94109,
Attorney for Appellants
Storer, et al.

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San Francisco, California 94105,
Attorneys for Appellants
Hall, et al.



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In the Supreme Court

OF THE
United States

OCTOBER TERM, 1972

No.

THOMAS TONE STORER, et al., *Appellants*,

VS.

EDMUND G. BROWN, JR., et al., *Appellees*.

GUS HALL, et al., *Appellants*,

VS.

EDMUND G. BROWN, JR., *Appellee*.

On Appeal from the United States District Court
for the Northern District of California

JURISDICTIONAL STATEMENT

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the Northern District of California, entered on September 8, 1972, denying appellants injunctive and declaratory relief and granting appellees' motions to dismiss.

OPINION BELOW

The opinion of the District Court for the Northern District of California is as yet unreported. A copy of that opinion and order is attached hereto as Appendix A.

JURISDICTION

The jurisdiction of the court below was invoked pursuant to 42 U.S.C. §§1981, 1983, 1985(3) and 1988; 28 U.S.C. §§1331(a), 1343(4), 1357, 2201, 2202, 2281, and 2284; Article I, §2, Clause 2, of the United States Constitution; and the First and Fourteenth Amendments to the United States Constitution. The judgment of the court below was entered on September 8, 1972, and notice of appeal was filed in that court on September 13, 1972. An order extending the time in which to file appellants' jurisdictional statement to and including December 4, 1972, was filed by Mr. Justice Douglas on November 13, 1972. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1253.

QUESTIONS PRESENTED

1. Whether California Elections Code §§6830(c) and 6830(d) which, singly or in combination operate to deny appellants their right to appear on the ballot, to nominate persons of their choice for the ballot and to vote for persons of their choice, violate the First and Fourteenth Amendments because they condition access to the ballot on unreasonable conditions supported by no legitimate state interest.

2. Whether California Elections Code §§6830(c) and 6830(d) further violate Article I, §2, Clause 2, of the United States Constitution by adding qualifications for the office of U.S. Congressman.

3. Whether California Elections Code §§6830(c), 6830(d), 6833, 6864 and 6831, which, singly or in combined effect, make it impossible for an independent candidate to secure a place on the ballot, violate the First and Fourteenth Amendments by denying appellants due process and the equal protection of the law in the fundamental protected area of the right to vote and run for office.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, First Amendment:

“Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

Constitution of the United States, Fourteenth Amendment, due process and equal protection clauses:

“ . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Constitution of the United States, Article I, §2, Clause 2:

"No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen."

California Elections Code, §§6830, 6831, 6833, 6864, 6430 and 6082, all of which are fully set forth in Appendix B.

STATEMENT

Thomas Tone Storer was a candidate for the United States Congress in California's Sixth Congressional District. He was an independent who wished to appear on the November 7, 1972 general election ballot and be so designated.

Storer is an attorney at law who has been politically active in California's Marin County for a number of years. In November of 1964 he was elected to the Board of Supervisors of Marin County; he defeated an incumbent in a run-off election. In 1966 he won the Democratic nomination for United States Congressman in the First Congressional District (which then included Marin County) but was defeated by the incumbent Congressman at the general election. In 1968 Storer sought re-election to the Board of Supervisors and was narrowly defeated.

Storer, for most of his political life, has been affiliated with the Democratic Party. In the past few years, however, he has been distressed at the quality

of political leadership in the United States and has concluded that the situation will not improve as long as the Democratic and Republican parties, which he feels are excessively controlled by money interests, dominate the country's political life to the exclusion of independent voices. Storer made his disaffection with the Democratic Party formal by changing his registration from "Democrat" to "Decline to State" (i.e., under California law, "Independent") in January of 1972.

Gus Hall and Jarvis Tyner are members of the Communist Party of the United States. They were candidates for the offices of President and Vice-President, respectively, of the United States in the November 7, 1972 election. They desired to run as independent candidates for those offices in the State of California and to be so designated on the election ballot. They collected and properly filed 25,000 nomination signatures, well in excess of the 18,000 required for recognized parties to place a candidate on the Presidential ballot in California.

All of the appellant-candidates were ready, willing, and able to tender the required filing fee and to meet any other reasonable requirements for positions on the ballot in California as independent candidates. Appellees refused to place their names on the ballot, relying on the following provisions of California law:

A. California Elections Code §§6833, 6864, 6830 and 6831 which, in combined effect, make it virtually impossible for anyone to qualify as an independent candidate on a November election ballot:

1) §6831 prohibited appellants' names from appearing on the ballot unless they had acquired the signatures of not less than 5% nor more than 6% of the entire vote cast in the preceding general election.

2) §§6833 and 6864 gave appellants but 24 days in which to acquire those signatures. They were not permitted to circulate nomination petitions for voters' signatures before August 15, 1972, and would have had to acquire the requisite number of valid signatures by September 8, 1972.

3) California Elections Code §6830(c) provides that no person could validly sign appellant-candidates nomination papers who had voted in the primary election of June 6, 1972.

By contrast, a partisan candidate for Congress may appear on a primary ballot with no more than 40 signatures of sponsors and persons are not prohibited from signing his nominating papers by virtue of their participation in any elections. A partisan candidate for President or Vice President may appear on the primary ballot with no more than 18,000 signatures of sponsors and, likewise, they are not excluded by virtue of their participation in any elections.

B. California Elections Code §6830(d) prohibits any person who has been registered as affiliated with a political party at any time after June 6, 1971, from appearing on the ballot as an independent candidate. Storer had been registered as affiliated with the Democratic Party until January of 1972.

C. California Elections Code §6830(c) prohibits anyone who has voted "at the immediately preceding

primary election at which a candidate was nominated for the office mentioned in the nomination paper" from running as an independent candidate for Congress. Storer voted in the primary election of June 6, 1972, in order to exercise his franchise on non-partisan matters; but because nominees for the office of United States Representative from the Sixth Congressional District were voted upon by partisan voters at that primary election, Storer's exercise of his right to the franchise resulted in his being unable to appear on the ballot as an independent Congressional candidate.

The three appellant-candidates in these suits are joined by registered voters who wished to sign nomination papers but were foreclosed, by California law, from doing so.

These appellants were foreclosed from signing nomination papers for an independent candidate because they had voted in the Democratic Primary of June 6, 1972. They were foreclosed from signing the nomination papers even though they signed no nomination papers for any other candidate for the respective offices in the primary election of June 6, 1972, or for the general election of November 7, 1972. Indeed, two of these appellants, Johnson and Soladay, while voting in the Democratic Party Primary, did not cast votes for either of the candidates for the Democratic nomination for Congressman of the Sixth Congressional District.

Storer and his co-appellants filed their suit on May 30, 1972, contending that the California scheme regulating the appearance of independent candidates on

the ballot violated the following fundamental Constitutional rights:

- a) The right to seek and hold office;
- b) The right to equal protection of the laws;
- c) The right to due process of law;
- d) The right freely to express views and effectively participate in the political processes of the United States and California as guaranteed by the First Amendment to the United States Constitution.

And they contended, further, that California Elections Code §6830(d), by absolutely prohibiting Storer from appearing on the ballot because he had, within the past year, been affiliated with the Democratic Party, and California Elections Code §6830(c), by absolutely prohibiting Storer from appearing on the ballot as a candidate for United States Representative because he voted in the primary election of June 6, 1972, unconstitutionally added to the qualifications for Representative in the United States Congress in violation of Article 1, §2, Clause 2 of the United States Constitution.

In their prayer, appellants sought a declaration that the challenged sections of the California Elections Code are unconstitutional and an injunction providing that, upon Storer's tendering of the statutory filing fee and the presentation by him of a nomination petition signed by at least 40 electors qualified to vote in the Sixth Congressional District, defendants be required to certify Storer as a candi-

date for United States Representative in the Sixth Congressional District and defendants be required to place his name on the ballot.

On August 11, 1972, Hall and his co-plaintiffs filed suit attacking Elections Code §§6830(c), 6831, 6833, and 6864 on the same grounds as *Storer*, but as they applied to Presidential candidacies. Three-judge courts, identical in composition, were convened to hear both suits. The District Court heard argument in *Storer* on August 31, 1972, and at the Court's suggestion, counsel for *Hall* stipulated that their case would be submitted on the briefs and the *Storer* argument.

The judgment of the Court below, denying, on the merits, the relief prayed for by appellants was filed on September 8, 1972. See Appendix A. The Notice of Appeal was filed on September 13, 1972.

On September 14, 1972, appellants applied to Mr. Justice Douglas for an injunction. The relief for which they prayed, pending disposition of this case on appeal, was the placing of their names on California's general election ballot of November 7, 1972. Oral argument before Mr. Justice Douglas was heard on September 15, 1972, in Gooseprairie, Washington. Mr. Justice Douglas denied appellants' Application for Injunctive Relief on that same date.

THE QUESTIONS ARE SUBSTANTIAL

California has made it virtually impossible for anyone to appear on its general election ballot as an independent candidate for federal office. Indeed, no one

has ever been able to satisfy the statutory requirements for independent candidacy.

Whether a state has the power to require candidates for political office, particularly federal political office, to affiliate with a recognized political party as the price for appearance on the ballot is about as substantial a question as one might imagine.

**A. THE IMPOSSIBILITY OF SATISFYING CALIFORNIA'S
STATUTORY SCHEME FOR INDEPENDENT CANDIDACY**

California requires appellant-candidates to obtain 5% of the electorate's signatures in order to qualify for the ballot. That requirement, standing alone, might not be thought an unreasonable regulation of access to the ballot. See *Jackson v. Ogilvie*, 325 F.Supp. 864 (N.D.Ill. 1970) (three-judge court), *aff'd* mem. 403 U.S. 925 (1971). But California Elections Code §6831, when read together with §6830(c), does not simply require appellants to obtain the signatures of 5% of the registered voters. By virtue of §6830(c)'s exclusion from the group of potential signers those who have voted in the primary, §6831 limits the number of voters who could sign appellants' ballot petitions to approximately 30% of registered voters. By requiring appellants to obtain the signatures of 5% of this limited electorate, California, in effect, places on appellants a burden greater than a requirement that they produce the signatures of 20% of the registered voters in the district (in the case of *Storer*), or throughout the state (in the case of *Hall*). And this

immense number of signatures must be gleaned from a small portion of the general public, unidentifiable by any physical or geographical traits, which is composed of those persons least interested in the electoral process (those who did not even bother to vote at the primary election). And all of this must be done in a period of 24 days during that period in the latter part of August when residents are most likely to be away on vacation.

This immense burden, greater in magnitude than the 15% requirement struck down in *Williams v. Rhodes*, 392 U.S. 23 (1968), should be struck down on the authority of *Williams* alone. But it also has some additional infirmities.

In the first place, California Elections Code §6830 (c), by prohibiting those who have voted in the preceding primary election from signing nomination papers of an independent candidate, unconstitutionally conditions the exercise of a fundamental right on the relinquishment of another fundamental right. Co-appellants of the appellant-candidates are prohibited from signing the petitions of an independent candidate because, and solely because, they exercised their right to vote. They had no control over the names of the candidates who appeared on their primary ballot, they signed no nominating petitions for candidates appearing in the primaries, and Storer's co-appellants, Johnson and Soladay, did not even vote in the primary for either of the choices presented to them.

The state may not condition the exercise of one constitutional right (in this case the right effectively

to participate in the electoral process by signing the nomination papers of a candidate for office) on the abandonment of another constitutional right (in this case the right to vote in an election). See *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

Secondly, prohibiting those who have voted in the primary elections from signing the papers of an independent candidate, since it invidiously discriminates between groups of the electorate for no legitimate reason, violates the equal protection clause of the Fourteenth Amendment. Cf. *Kramer v. Union Free School District*, 395 U.S. 621 (1969).

Thirdly, even if §6830(c) prohibited, in the customary fashion, voters who signed the *nominating papers* of a partisan candidate from signing those of an independent candidate, it would still be constitutionally infirm because the statutory period for collecting signatures on partisan nominating papers *precedes* that of the period in which to acquire signatures on nominating papers of an independent candidate. Thus partisan candidates are given an unfair advantage, the opportunity to approach signators before independent candidates may even become formal candidates. The placing of such a special obstacle on independent candidates has been raised in two federal cases with which appellants are familiar. In both it was avoided by a statutory construction which left the independent candidate on essentially the same footing as partisan candidates. See *Moore v. Board*

of *Elections for District of Columbia*, 319 F.Supp. 437 (D.D.C. 1970); *Jackson v. Ogilvie*, *supra*. §6830(c), however, cannot be saved by statutory construction. It places a special obstacle on the independent candidate by removing from his group of nomination supporters some 70% of the electorate before the period in which he may gather his signatures even begins. Accordingly, §6830(c), individually and in combination with §§6831 and 6833, violates the First and Fourteenth Amendments to the United States Constitution.

Finally, the requirement that Appellants obtain all these signatures from such a limited, unidentifiable and elusive group within a twenty-four day period is simply preposterous. What conceivable purpose can it serve? None but to hector the candidate and insure that no one can ever satisfy the requirement. "The three-week requirement is suffocating and effectively blocks access to the ballot by all but the most disciplined of minority political organizations. It freezes the status quo and reduces the voters' choice to a bare minimum." *People's Party v. Tucker*, 347 F. Supp. 1, 4 (M.D. Penna. 1972) (three-judge court).¹

To all of this the Court below replied that California has a legitimate interest in avoiding a "laundry list" ballot. Agreed. But that interest cannot be pursued in any manner that the not totally disinterested

¹In *People's Party* the court struck down a provision requiring political bodies wishing their candidates to appear on the ballot to secure the signatures of 2% of the largest vote cast in the state at the last election in a three-week period.

Legislature chooses to adopt. Why is it that independents are deemed a clutter on the ballot and Democrats are not? Should the Democratically controlled Legislature conclude that the appearance of Republican names makes for an untidy ballot, can it ban that party's nominees? Hardly. If the legitimate interest in avoiding a "laundry list" ballot were a talismanic response to every attempt to avoid invidious electoral discrimination, then the petitioners in *Williams v. Rhodes, supra*, should have lost.

But they won.

They won because the state's concededly legitimate interest in keeping the size of the ballot manageable cannot be promoted in a manner which broadly stifles electoral liberty when there is available to the state an alternative means, less subversive of the fundamental right to vote, which can advance the state's cause while leaving the ballot as an effective tool for reflecting the will of the people. California can require that those seeking office as independents demonstrate significant community support. Appellants would not, as a constitutional matter, quarrel with a simple requirement that they obtain the signatures of 5% of the electorate within a reasonable amount of time and with the entire electorate composing the pool from which they must draw support. Appellants could easily comply with such a requirement. But that is not California's law. The California Legislature, composed of Democrats and Republicans, has fenced out of the elections all "spoilers" who might bring an air of uncertainty to elections in the "safe"

districts it has drawn. It has made it virtually impossible for anyone to qualify as an independent Congressional or Presidential candidate. And this California cannot do. The Constitution forbids it.

**B. ELECTIONS CODE §6830(d) AND THE STATE INTEREST
IN INHIBITING "PARTY HOPPING"**

California prohibits anyone from appearing on the ballot as an independent candidate who has, within the 17-month period preceding the general election, been affiliated with a political party. §6830(d). Appellant Storer, because he had been registered as a Democrat until some ten months before the general election, was thus absolutely precluded from appearing on the general election ballot. This, the court below said, is a valid measure designed to inhibit "party hopping." But appellant Storer has not hopped among parties. He does not seek any political party's nomination.

True enough, some statutory provisions requiring candidates for office to be affiliated with a political party for a lengthy period before seeking that party's nomination have been upheld on the theory that the state is promoting party loyalty and discouraging a "raid" by one party on another. See, e.g., *Lippitt v. Cipollone*, 337 F.Supp. 1405 (N.D. Ohio 1971) (three-judge court), *aff'd* _____ U.S. _____, 92 S.Ct. 729 (1972). But §6830(d) cannot be said to promote any such objectives. The state cannot argue that there is any

such thing as "independent" loyalty or that it has an interest in insisting that the disaffected, if they are to seek political office, must remain within the party which has engendered their disaffection.

It is one thing to maintain that the state has a legitimate interest in insuring that the nominees of a political party are loyal to that party's principles. It is quite another to maintain that the state has a legitimate interest in generally promoting political loyalty to partisan parties and has the power to withdraw political rights from those who would announce their independence of political parties. The state has as much business requiring us to belong to a political party as it would requiring us to attend church. If there is one thing that is unambiguously clear about the First Amendment it is that the state does not have the power to promote orthodoxies, be they political or otherwise. See *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

Far from being a "compelling interest" which overrides appellants' political rights, California's insistence upon loyalty to some political party as the price for candidacy promotes no legitimate interest at all but seeks to do precisely what the First Amendment prohibits.

Moreover, appellant Storer's attack on §6830(d) is not confined to First and Fourteenth Amendment rights. He also contends that §6830(d) provides an additional qualification for the office of Congress not contained in Article I, §2, Clause 2 of the United States Constitution. It has never been held, or to

appellants' knowledge even suggested, that the states may expand upon those qualifications for federal office contained in the United States Constitution on the plea that they have a "compelling interest" in doing so.

Although there is a manifest tension between the description of qualifications contained in Article I, §2 on the one hand, and, on the other, the provision of Article I, §4 giving the states the power to set the "times, places and manners" of holding elections (a tension which has created some conflict in decisions regarding Article I, §2), it is clear, nevertheless, that a simple requirement of status which prohibits a person from appearing on the ballot because he is a member of a class from which he cannot escape (i.e., people who have been affiliated with a political party in the preceding 17 months) is a "qualification" for office and not a "time, place or manner" of holding an election. See, e.g., *Dillon v. Fiorina*, 340 F.Supp. 729 (D.N.M. 1972) (three-judge court) (holding New Mexico provisions limiting candidates for a political party's Senatorial nomination to those who had been members of the party for a year, and residents of the state for an additional year, in conflict with Article I, §3's description of the qualifications of a candidate for United States Senate).

In short, §6830(d) of the California Elections Code violates the First and Fourteenth Amendments because it conditions access to the ballot on an unreasonable condition supported by no legitimate state interest and because it adds a qualification for office

in violation of Article I, §2, Clause 2 of the United States Constitution.²

C. THIS CASE IS NOT MOOT

The 1972 election is behind us but this case is not, as appellees will doubtless urge, moot. Election suits are not ripe until that period just before an election and by the time one is heard by a three-judge court the opportunity to bring a case before this Court before an election is usually gone. This Court, in *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969), held that where election laws are challenged and the challenge raises questions which are "capable of repetition, yet evading review," the cause will not be deemed moot simply because the election has passed. Appellants sought, in addition to a place on the ballot, declarations of unconstitutionality and injunctions restraining

²Appellants also challenge that portion of California's Elections Code §6830(c) which prohibits anyone who has voted "at the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper" from running as an independent candidate for Congress as a violation of Article I, §2. Storer voted in the primary for the reason that, in California, independents, as well as those who are registered with a political party, may vote in the primary. Independents vote for non-partisan offices and on ballot propositions. See California Elections Code §§10290, 10291, 10298 and 10318. Prohibiting Storer from running for Congress simply because he had voted in a non-partisan primary would obviously be unconstitutional. In the Court below, the Attorney General took the position that §6830(c) should be interpreted to exclude from the ballot only those who had voted on a partisan ballot, as distinguished from a non-partisan ballot, at the primary election. §6830(c), however, does not make the distinction urged by the Attorney General. If the Attorney General's construction were adopted it would satisfy appellant's objection, but the Court below declined to give appellants declaratory relief even on the question of the meaning of §6830(c).

enforcement of California's election scheme for independent candidacy. Appellants are still entitled to answers to the questions they have raised.

CONCLUSION

The latest public opinion polls report a dramatic decline in the people's trust of government—a decline that is all the more disturbing in an election year when the voters had an opportunity to register their disapproval by electing new officials.

But the electoral choices did not seem attractive to large numbers of citizens. To them the political air was stagnant and the dialogue pointless. In California, new registrants are declining to affiliate with any political party in unprecedented numbers. In some counties the number of new registrants who identify themselves as independents exceeds the number of new Republican registrants and threatens the Democrats.

Surely these people have a right to run for office and just as surely they have the right to choose from among candidates other than those designated by the political parties with which they refuse to affiliate.

It was not the intent of the Framers to limit the electorate's choice to Democrats and Republicans, there being no Democrats or Republicans at the time the Constitution was adopted. They envisioned an open society, free of governmentally imposed political orthodoxy, in which the ballot would be a mirror

genuinely reflecting the will of the people. California's election laws are not consistent with that vision; they affront it and work to blur it.

The questions presented by this appeal are, appellants respectfully urge, substantial ones of significant public importance.

Dated, San Francisco, California,
December 4, 1972.

Respectfully submitted,
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(Appendices Follow)

Appendix A

In The United States District Court For The Northern District Of California

Thomas T. Storer, et al.,
Plaintiffs,

vs.

Edmund G. Brown, Jr. et al.,
Defendants.

C-72-978

Gus Hall, et al.,
Plaintiffs,

vs.

Edmund G. Brown, Jr., et al.,
Defendants.

C-72-1468

[Filed September 8, 1972]

OPINION AND ORDER

The above cases, though not identical as to parties and presenting slightly different contentions, or the same contentions in slightly different contexts, present, in the view of the Court, substantially the same ultimate issues and require only a single opinion.¹

¹*Storer*, in which plaintiffs are potential candidates for the office of Representative in Congress and certain of their alleged supporters, was commenced first, had passed through the stages of designation of a three-judge District Court pursuant to 28 U.S.C. §2284 and plaintiff's motion for a preliminary injunction and defendants' motion to dismiss were set for hearing when *Hall* was filed on behalf of a potential candidate for President of the United States. By appropriate orders and stipulations, although the cases were never consolidated, the parties to *Hall* will be bound by the

Both cases turn in the final analysis on the Constitutionality of Division 5, Chapter 3, comprising §§6800 through 6290, of the California Elections Code, providing a procedure for so-called Independent nominations by which a candidate for any public office not nominated in the party primaries may obtain a place on the ballot as an Independent candidate. Plaintiff Storer and plaintiff-intervenor Frommhagen, not having been nominated in their party primaries as candidates for Representative in Congress for their respective districts and plaintiff Hall, not having been nominated in the presidential primary for President of the United States, allege that they wish to appear as candidates for such offices as Independent, but are effectively barred from doing so by various provisions of the statutes referred to above, especially §§6830(c) and (d) (which disqualify persons who voted at the immediately preceding primary election from being either candidates or signers of a candidate's nomination papers for Independent status and also disqualify a person registered as a party member for one year preceding the immediately preceding primary from being a candidate in an Independent capacity); 6831 (requiring the signatures on nomination papers for Independent candidates of 5 to 6% of the entire vote in the district in the preceding general election—alleged to require some 9,500 signa-

rulings made in *Storer* which are common to both cases and any separate issues in *Hall* stand submitted without further briefing or oral argument. The view taken by the Court herein is such that there are no separate issues in *Hall* and the rulings expressed are dispositive of both cases. Unless otherwise indicated, all statutory references are to the California Elections Code.

tures in the district Storer seeks to represent and state on an exhibit to the complaint in intervention to require some 7,500 signatures in the case of Fromm-hagen) and 6833 (allowing only 24 days within which to prepare, file and lodge Independent nomination papers). Storer alleges that he is over the Constitutionally required age of 25, is a registered voter, presently unaffiliated with any political party, though previously a registered Democrat for many years prior to January, 1972 when he switched his registration to "Decline to State." He intends, however, as the law allows, to vote in the June 6, 1972 primary on non-partisan matters (The complaint, filed in May, 1972, necessarily limits the plaintiffs to a statement of their intentions with respect thereto.) Johnson intends likewise to vote on non-partisan matters but not to vote for a Democratic candidate for Representative in Congress. Fracchia and Drath intend to vote on all matters they are entitled to by virtue of their Democratic registration, including nomination of a Representative in Congress. All the four plaintiffs mentioned above, however, desire to sign Independent nomination papers for Storer.

As the foregoing summary of the relevant statutes shows, Storer will be barred from Independent candidacy by §6830(c) if he carried out his stated intention of voting on nonpartisan matters in the June primary and by §6830(c) and (d) by virtue of his prior Democratic registration, and all plaintiffs mentioned above will be barred from signing Storer's nomination papers by §6830(c).

In addition, all plaintiffs complain of the large signature requirements of §6831 and the short time to meet them afforded by §6833.

Plaintiff-intervenor Frommhagen alleges his age qualification, his change of registration from Republican to Democrat in 1969 and from Democrat to "Decline to State" in March 1972.

The other five plaintiffs in intervention joining Frommhagen are all barred, contrary to their wishes, from signing Independent nomination papers for Frommhagen as registered members of either the Republican or Democratic party, by virtue of §6830(c).

In *Hall*, plaintiff alleges membership in the Communist Party of the United States, which has not qualified under the requirements of §6430; as mentioned above, he seeks to be a candidate for President of the United States and is otherwise allegedly qualified for the office, but can do so only under the Independent nomination procedure. Like allegations are made as to plaintiff Tyner, who seeks the Vice Presidency. Plaintiff Wilkinson is registered as a Democrat; plaintiff Lima is a registered Communist; and plaintiffs Lopez and Graham are registered as affiliated with La Raza Unida Party.

The plaintiffs in *Hall* advance virtually the same objections as are advanced in *Storer*: the signature requirements of §6831, the short time periods afforded by §§6833 and 6864 and the qualification of signers provided by §6830(c). For obvious reasons, they do

not attack the prohibition on candidacy made by §6830(d), since the proposed candidates are not members of a qualified political party.

California affords candidates at least four paths to partisan office; while some may be smoother than others, they are nevertheless open: (1) obtaining the nomination of one of the established parties in a regular direct party primary (Division 5, Chapters 1 and 2); (2) the formation and qualification of a new party and obtaining its nomination (§6430), the requirements for which were upheld in *Christian Nationalist Party v. Jordan*, 49 C.2d 448 (1957); *Socialist Party, U.S.A. v. Jordan*, 49 C.2d 864 (1957), *certiorari denied*, 356 U.S. 952 (1957); (3) the Independent nomination procedure here involved; (4) the write-in procedure afforded in both the primary and general elections by §§10213, 10228, 10292, 10317, and 14412.

It cannot be said, in view of the foregoing, that any individual wishing to pursue a political career lacks ample opportunity to do so nor that individual voters are not afforded an adequate opportunity to vote for candidates of their choice. While a state may not create a situation in which parties are *de facto* restricted to the old established parties, Republican and Democratic, *Williams v. Rhodes*, 393 U.S. 23 (1968), this is certainly not true in California; we are advised without dispute that at present four parties enjoy official recognition on the California ballot. Thus, the basic freedoms guaranteed by the First and Fourteenth Amendments and invoked by plain-

tiffs here are satisfied. *Jennes v. Fortson*, 403 U.S. 431 (1971).

Legislatures of the respective states have broad powers, granted by Article I, Section 4 and Article II, Section 1 of the Constitution itself, to regulate the conduct of elections for Senators and Representatives and for electors for President and Vice President. While such power is not unlimited, *Williams v. Rhodes, supra*; *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963), restrictions upon candidacy are subject only to a showing of legitimate state interest reasonably carried out.

The California statutes in question here are obviously designed to make it difficult to create, if not in fact to prevent, the confusion which would result from the unfettered ability of candidates and voters to skip freely from one party affiliation to another or to disavow previous party affiliations on short notice and strike out on their own as plaintiffs seek to do here. The prevention of such confusion is a legitimate objective. *Bendinger v. Ogilvie*, 335 F. Supp. 572 (N.D.Ill. 1971, three-judge court). There is no Constitutional prohibition, therefore, against legislation which, to this end, imposes more onerous requirements upon candidates and voters seeking to engage in "party hopping". *Jackson v. Ogilvie*, 325 F.Supp. 864 (N.D.Ill. 1971, three-judge court, one judge dissenting), *affirmed*, 403 U.S. 925 (1971).

Inasmuch as the foregoing principles are well-settled and the special requirements for Independent

nomination in California attacked in these cases fall well within them, plaintiffs have failed to state a claim upon which relief can be granted. Requirements and restrictions closely similar to those here attacked have been upheld against attack on virtually the same grounds advanced here. Cf. *Bendinger v. Ogilvie*, *supra*, (disqualification of candidates affiliated with another party within prior two years—compare §6830(c), (d) *Jackson v. Ogilvie*, *supra*, (disqualification as signers of nomination papers of those voting in preceding primary—compare §6830(c)); *Moore v. Board of Electors*, 319 F.Supp. 437 (D.D.C. 1970, three-judge court) (additional signatures and more limited time periods for Independent candidates—compare §§6831 and 6833).

The long and short of it is that the California Legislature, like those of many if not most states, has determined that the orderly functioning of the electoral process is best served by promoting party loyalty to one of a reasonable number of qualified parties with which the candidate or voter has established and maintained his affiliation for a reasonable period of time and, as said above, to discourage the confusion necessarily attendant upon a proliferation of candidates and a "laundry list" ballot.² These ob-

²A reasonable argument can be made that as a result of the number of qualified parties, the large number of special quasi-municipal districts authorized by law and requiring voter approval for certain types of action, all taken together with the California-adopted Populist practices of initiative, referendum and recall, the California ballot is already far too long for the average intelligent voter to cope with; this Court would be most loath to lengthen it, as is the Legislature.

jectives are clearly permissible under the First and Fourteenth Amendments, and the requirements here attacked do not transcend the permissible means of achieving such objectives.

For the foregoing reasons, the defendants' motions to dismiss in each of the above cases are granted and the complaints and actions are dismissed.

Dated, September 8, 1972.

/s/ O. D. Hamlin,
Senior United States Circuit Judge.
Robert H. Schnacke,
United States District Judge.

³Hon. William G. East, Senior United States District Judge, the third member of the Court, has indicated his concurrence in the preceding Opinion and Order, although prevented by official duties elsewhere from affixing his signature.

Appendix B

California Elections Code—Nominations

—Chapter 3—

Independent Nominations

§6830. *Contents*

“Each candidate or group of candidates shall file a nomination paper which shall contain:

(a) The name and residence address of each candidate, including the name of the county in which he resides.

(b) A designation of the office for which the candidate or group seeks nomination.

(c) A statement that the candidate and each signer of his nomination paper did not vote at the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper. The statement required in this subdivision shall be omitted when no candidate was nominated for the office at the preceding primary election.

(d) A statement that the candidate is not, and was not at any time during the one year preceding the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper, registered as affiliated with a political party qualified under the provisions of Section 6430. The statement required by this subdivision shall be omitted when no primary election was held to nominate candidates for the office to which the independent nomination paper is directed.”

§6831. *Signatures required*

"Nomination papers shall be signed by voters of the area for which the candidate is to be nominated, not less in number than 5 percent nor more than 6 percent of the entire vote cast in the area at the preceding general election. Nomination papers for Representative in Congress, State Senator or Assemblyman, to be voted for at a special election to fill a vacancy, shall be signed by voters in the district not less in number than 500 or 1 percent of the entire vote cast in the area at the preceding general election, whichever is less, nor more than 1,000."

§6833. *Time for filing, circulation and signing; verification*

"Nomination papers required to be filed with the Secretary of State or with the county clerk shall be filed not more than 79 nor less than 54 days before the day of the election, but shall be prepared, circulated, signed, verified and left with the county clerk for examination, or for examination and filing, no earlier than 84 days before the election and no later than 5 p.m. 60 days before the election. If the total number of signatures submitted to a county clerk for an office entirely within that county does not equal the number of signatures needed to qualify the candidate, the county clerk shall declare the petition void and is not required to verify the signatures. If the district falls within two or more counties, the county clerk shall within two working days report in writing to the Secretary of State the total number of signatures

filed. If the Secretary of State finds that the total number of signatures filed in the district or state is less than the minimum number required to qualify the candidate he shall within one working day notify in writing the counties involved that they need not verify the signatures."

§6864. *Time for obtaining signatures*

"Verification deputies appointed to obtain signatures to the nomination paper of any candidate may, at any time not more than 84 nor less than 59 days prior to the election, obtain signatures to the nomination paper of the candidate."

PARTY CANDIDATES

§6430. *Qualified parties*

"A party is qualified to participate in any primary election:

(a) If at the last preceding gubernatorial election there was polled for any one of its candidates who was the candidate of that party only for any office voted on throughout the State, at least 2 percent of the entire vote of the State; or

(b) If at the last preceding gubernatorial election there was polled for any one of its candidates who, upon the date of that election, as shown by the affidavits of registration of voters in the county of his residence, was affiliated with that party and was the joint candidate of that party and any other party for any office voted on throughout the State, at least 6 percent of the entire vote of the State; or

(c) If on or before the 135th day before any primary election, it appears to the Secretary of State, as a result of examining and totaling the statement of voters and their political affiliations transmitted to him by the county clerks, that voters equal in number to at least 1 percent of the entire vote of the State at the last preceding gubernatorial election have declared their intention to affiliate with that party; or

(d) If on or before the 135th day before any primary election, there is filed with the Secretary of State a petition signed by voters, equal in number to at least 10 percent of the entire vote of the State at the last preceding gubernatorial election, declaring that they represent a proposed party, the name of which shall be stated in the petition, which proposed party those voters desire to have participate in that primary election. This petition shall be circulated, signed, verified and the signatures of the voters on it shall be certified to and transmitted to the Secretary of State by the county clerks substantially as provided for initiative petitions. Each page of the petition shall bear a caption in 18-point blackface type, which caption shall be the name of the proposed party followed by the words "Petition to participate in the primary election." No voters or organization of voters shall assume a party name or designation which is so similar to the name of an existing party as to mislead voters.

Whenever the registration of any party which qualified in the previous direct primary election falls

below one-fifteenth of 1 percent of the total state registration, that party shall not be qualified to participate in the primary election but shall be deemed to have been abandoned by the voters, since the expense of printing ballots and holding a primary election would be an unjustifiable expense and burden to the State for so small a group. The Secretary of State shall immediately remove the name of the party from any list, notice, ballot, or other publication containing the names of the parties qualified to participate in the primary election."

§6082. *Signatures on nomination papers*

"Nomination papers for candidates for delegates of any party should be signed by not less than one-half of 1 percent and not more than 2 percent of the vote constituting the basis of percentage."

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In the Supreme Court of the
United States

MICHAEL RODAK, JR.

OCTOBER TERM, 1972

No. 72- 812

No. 72-6050

THOMAS TONE STORER, et al., *Appellants*,

VS.

EDMUND G. BROWN, JR., et al., *Appellees*.

GUS HALL, et al., *Appellants*,

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LAURENCE H. FROMMHAGEN, *Appellant*,

VS.

EDMUND G. BROWN, JR., *Appellee*.

**On Appeal from the United States District Court
for the Northern District of California**

Motion to Affirm

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In the Supreme Court of the United States

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On Appeal from the United States District Court
for the Northern District of California

Motion to Affirm

Pursuant to Supreme Court Rule 16 (1)(c), Appellee Edmund G. Brown, Jr., Secretary of State, State of California, hereby moves to affirm the decision in the above entitled cases on the ground that the questions presented are so unsubstantial as not to warrant further argument.

OPINION BELOW

The Opinion and Order concurred in unanimously by the three judge federal court, applicable to all the above entitled cases, and as to which this single Motion to Affirm is filed, is contained in Appendix A of the Jurisdictional Statement of appellants *Storer* and *Hall*, et al.

INTRODUCTORY STATEMENT

These cases are apparently one of a number of cases which have arisen throughout the country from a failure of persons such as appellants to properly understand this Court's holding in the case of *Williams v. Rhodes*, 393 U.S. 23 (1968), as clearly explained in this Court's decision in *Jenness v. Forston*, 403 U.S. 431 (1971). Appellants significantly fail to mention this latter case in their jurisdictional statements.

California law involves an intermeshing of primary and general elections laws. Provisions are made for (1) qualification of political parties, both old and new, who participate in primary elections, for (2) independent candidates, who would participate in general elections, and for (3) write-in candidates, both at the primary and general elections.

The California election laws in their totality present a balance between (a) electors' rights to vote, run for office and also associate for the advancement of political beliefs, and (b) the compelling interests of the State, recognized by this Court and many other courts to prevent proliferation of candidates on the ballot by requiring a modicum of support for ballot status as well as the protection of our party system, which is the essence of our democracy.

Appellants would have this Court ignore the totality of the California system, isolate the Independent Nomination Procedure, hold unconstitutional all the substantive pro-

visions of the Independent Nomination Procedure, leaving the candidate-appellants with virtually no impediments between them and the ballot other than a requirement of a clearly insubstantial number of signatures on a petition. For example, appellants in *Storer* would have anyone who can obtain 40 signatures qualify for a place on the general election ballot for Congress.

The three judge federal court below saw through the erroneous approach of the appellants, considered California's election laws in their *totality*, and in so doing properly held that such laws in no way infringed upon the basic freedoms of appellants.

QUESTIONS PRESENTED

1. Does California law in its totality, which provides alternative means for running for office and associating for the advancement of political beliefs, and which in no way freezes the political status quo, violate the fundamental rights of the appellants?
2. Assuming, *arguendo*, that the California Independent Nomination Procedure must be examined in a vacuum, do any of its substantive provisions violate the fundamental rights of the appellants?
3. Does California law, which still permits an individual to be a write-in candidate who has left his party within the year prior to the primary election, though prohibiting him from being an independent candidate at the general election, add an additional qualification for office to the office of United States Representative?

STATUTES INVOLVED

The main statutes involved herein are:

1. California Elections Code, section 6430 defining "qualified parties."

2. California Elections Code, sections 6800 through 6920, providing the Independent Nomination Procedure.

3. California Elections Code, sections 6260 through 6263, 10229 and sections 18600 through 18604 providing for write-in votes. See also sections 10213, 10228, 10292 and 10317.

4. California Elections Code, sections 6401, 6402(a) and 6611 and specifically sections 6801, 6830(c) and 6830(d) of the Independent Nomination Procedure, *supra*, all relating to maintaining party integrity.¹

STATEMENT OF FACTS

Appellants Storer and Frommhagen, registered as "Declines to state," each sought to have their names placed upon the ballot as independent candidates for Congress in their respective Congressional districts with the support of only 40 electors. Apparently they made absolutely no attempt to procure the requisite 5 percent signatures alleged to have been some 9,500 in Storer's district and some 7,500 in Frommhagen's district. Each was content to rely upon their belief that all the substantive provisions of the Independent Nomination Procedure were invalid, leaving only the necessity of filing papers with a few signatures with the election officials to gain ballot status in November 1972.

Appellants Hall and Tyner, admittedly members of the Communist Party, a party unable to meet the reasonable requirements for obtaining status as a "qualified party" in California, sought status as "independents" and decided also to select their own procedure for attempting to qualify for the ballot as "independents" for the offices of President

1. Hereinafter, all section references will be to the California Elections Code unless otherwise indicated. Because of the bulk of sections referred to in this motion, only key sections are included in the Appendices herein.

and Vice President by filing petitions *alleged* to contain 25,000 signatures (they were never verified). This, according to their own computations, would have been approximately 300,000 signatures fewer than the requisite 5 percent. Additionally, they sought to present themselves in the petitions as direct candidates, whereas the Independent Nomination Procedure requires a *slate of presidential electors* to be nominated as an independent slate favoring certain candidates.² They too also sought to invalidate all the applicable substantive provisions of the Independent Nomination Procedure to insure no impediments to ballot position in November 1972, with only insubstantial backing of the electorate.

The noncandidate appellants in each case constitute a great variety of party and nonparty voters, apparently chosen to represent every permutation and combination conceivable as between voter and candidate in the factual contexts presented, perhaps in the hope that the "shot-gun" approach might uncover a violation of some constitutional right.

The court below denied the appellants' motions for preliminary injunctions and granted the Secretary of State's motions to dismiss.

ARGUMENT

I. California's Election Laws Do Not Freeze the Status Quo, But Recognize the Fluidity of American Political Life

This Court in the case of *Jenness v. Forston*, 403 U.S. 431 (1971), pointed out that Ohio's election laws were held unconstitutional in *Williams v. Rhodes*, *supra*, 393 U.S. 23 (1968) because Ohio froze the status quo, thus making it virtually impossible for anyone other than a Republican or Democrat to run for president in Ohio.

2. See Sections 6800, 6803, 6804.

While *Jenness v. Forston* was cited by appellee, it was not mentioned by appellants either in their briefs below or in their jurisdictional statements herein. In *Jenness v. Forston*, this Court upheld a 5 percent signature requirement as to a "political body" or independent's ability to gain access to the ballot at the general election *vis a vis* the primary election nominee of a political party. The Court, after examining the *totality* of Georgia's laws in comparison with Ohio's, stated that:

"... Georgia's election laws, unlike Ohio's, do not operate to freeze the political status quo. In this setting we cannot say that Georgia's 5% petition requirement violates the Constitution." *Id.* at 438. (Emphasis added.)

Additionally, this Court held that:

"In a word, Georgia in no way freezes the status quo, but implicitly recognizes the fluidity of American political life" *Id.* at 439.

See also *Raza Unida Party v. Bullock*, 349 F. Supp. 1272, 1279 (W. D. Tex. 1972, three-judge court):

"... Following the *Jenness* command to look to the 'totality' of a state's requirements, and balancing Texas' burdensome organization requirements against its lenient 1% petition requirement, we hold that the organization requirements are constitutionally permissible." (Emphasis added)

This is exactly what the lower court did in the instant cases. It looked at California's laws in their totality. See Appendix A to Jurisdictional Statement, *Storer and Hall*, pp. iv-vi.

In California "qualified parties", that is, parties qualified to participate in primary elections, are provided for in section 6430.

Pursuant to section 6430 a party may attain the status of a qualified party in California if: (1) it polled at least 2 percent of the vote at the last gubernatorial election as to any statewide candidate, subdivision (a); or (2) if on the 135th day before the primary election it had registered with its party voters equal to 1 percent of the vote cast at the last gubernatorial election, subdivision (c); or (3) if before the 135th day before the primary election, it has filed a petition signed by voters equal in number to 10 percent of the votes cast at the last gubernatorial election, subdivision (d). (Subdivision (b) apparently was enacted to provide percentage requirements when cross-filing was prevalent in California.) See *Christian Nationalist Party v. Jordan*, 49 Cal. 2d 448; 318 P.2d 473 (1957), and *Socialist Party, U.S.A. v. Jordan*, 49 Cal. 2d 864; 318 P.2d 479 (1957), *cert. denied*, 356 U.S. 952 (1957), upholding the constitutionality of the predecessor to section 6430.

Section 6430 has insured the fluidity of political life in California in the past and in recent years. In fact, in 1968 both the American Independent Party and the Peace and Freedom Party qualified for a place on the California ballot under the provisions of subdivision (c). Each had over 100,000 registered party members when they qualified. These two minor parties were on the California ballot in 1972. The Democratic and Republican Parties thus have no monopoly on political life in California, nor have they had in the past. There is no freezing of the status quo in California. Obviously, under the literal terms of the liberal subdivision (c), *supra*, there could be one hundred parties qualified for the ballot in California.

Additionally, California has a write-in procedure applicable to both primary and general elections. §§ 10213, 10228,

10292, 10317. To avoid the necessity for counting votes for persons written in in jest, the 1968 Legislature enacted sections 18600 through 18604 to provide that if a person desires to be a write-in candidate, he file a declaration to that effect and pay the filing fee. California also has write-in procedures for the presidential primary, sections 6260-6263 and presidential electors, section 10229. This past election an incumbent Democratic Congressman won the nomination of the Republican Party through the write-in process, as well as that of his own party through the conventional printed ballot. Admittedly, there was no declared Republican opposition. The significant fact, however, is that over 5,000 write-in votes were cast for various Republican Party candidates in such district.

Thus, the write-in process, at least in California is not illusory. Voters can and will use it where there is the requisite motivation to do so (see Exhibit H to Secretary of State's Points and Authorities below in *Storer*). In *Beller v. Kirk*, 328 F.Supp. 485, (S.D. Fla. 1970, three-judge court), *aff'd sub nom*, *Beller v. Askew*, 403 U.S. 925 (1971), where the court upheld Florida's 3 percent signature requirement for new parties, the court also held:

"... There is no constitutional right to have one's name printed on the ballot ... While not having one's name printed on the ballot may put him to some disadvantage in relation to one whose name does appear on the ballot, this does not constitute invidious discrimination, nor is it unconstitutional."

See also *Jenness v. Forston*, *supra*, 403 U.S. 431, 434 (1971); *Sullivan v. Grasso*, 292 F.Supp. 411, 412 (D.Conn. 1968, three-judge court); *Cf. Shankey v. Staisey*, 257 A.2d 897, 899 (1969), *cert. denied*, 396 U.S. 1038 (1970), "... The right of a candidate to have his name [printed] on the ballot is not ... an absolute one..."

Thus, the fluidity of political life in California is guaranteed by section 6430, *supra*, permitting new groups or parties to qualify for the ballot with a modicum of support, and also by providing the write-in process. As a *bonus*, the Legislature has also provided the Independent Nomination Procedure, which appellants solely attack here, to insure greater fluidity and to further insure that the status quo is not frozen. *To our knowledge, there is no constitutional right to such a procedure. It is truly a legislative bonus*, which, as we will demonstrate herein meets constitutional standards, even when scrutinized by itself.

II. California's Independent Nomination Procedure Is Constitutional

Assuming *arguendo*, that California's Independent Nomination Procedure must be isolated and scrutinized in a vacuum and each element dissected, it is still constitutional. See §§ 6800-6920.

A. THE 5 PERCENT SIGNATURE REQUIREMENT IS VALID AS ARE OTHER SUBSTANTIAL SIGNATURE REQUIREMENTS

Section 6831 states that "Nomination papers shall be signed by voters of the area for which the candidate is to be nominated, not less in number than 5 percent . . . of the entire vote cast in the area at the preceding general election . . ."

This Court upheld the 5 percent signature requirement for independent nominees in Georgia in *Jenness v Forston*, *supra*, 403 U.S. 431 (1971). The appellants themselves point out that *Jackson v. Ogilvie*, 325 F.Supp. 864 (N.D.Ill. 1971, three-judge court), *aff'd mem*, 403 U.S. 925 (1971) also upheld such a 5 percent requirement. Other courts have upheld substantial signature requirements for independents or new parties. See, *e.g.*, *Baird v. Davoren*, 346 F.Supp. 515 (D.Mass. 1972, three-judge court), 3 percent requirement;

Beller v. Kirk, *supra*, 328 F.Supp. 485 (S.D.Fla. 1970, three-judge court), *aff'd sub nom*, *Beller v. Askeew*, 403 U.S. 925 (1971), 3 percent requirement.

"There is surely an important state interest in requiring some preliminary showing of a *significant* modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election. . . ." (Emphasis added.)

Jenness v. Forston, *supra*, 403 U.S. at 442, *re* the 5 percent requirement as to minor parties and independent candidates.

Despite these holdings, appellants asked for ballot position at the general election without the requisite *significant* modicum of support. *Storer* and *Frommshagen* claim they should have been permitted to have had their names printed on the ballot with only 40 signatures. *Hall's* and *Tyner's* position is analogous on the statewide level. Their positions border upon the ludicrous. See §§ 6080, 6082 and 6495.

B. SECTION 6830(c), INsofar AS IT REQUIRES SIGNATORIES WHO DID NOT VOTE AT A PRECEDING PRIMARY, IS VALID

Section 6830(c) requires a statement that ". . . each signer of [the] . . . nomination paper did not vote at the immediately preceding primary election at which a candidate was nominated for the office. . . ."

This Court has recognized the propriety of such a requirement at least twice in summary affirmances of lower courts. See *Moskowitz v. Power, et al.*, 305 N.Y. Supp. 2d 150 (1969), *appeal dismissed*, 396 U.S. 373 (1970); see also *Jackson v. Ogilvie*, *supra*, 325 F.Supp. 864, 867 (N.D.Ill. 1971, three-judge court), *aff'd mem*, 403 U.S. 925 (1971).

As stated in *Jackson v. Ogilvie*, *supra*, 325 F.Supp. at 867:

"... Thus, the state's scheme attempts to insure that each qualified elector may in fact exercise the political franchise. He may exercise it either by vote or by signing a nomination petition [for an independent]. He cannot have it both ways. Such a requirement seems not only fair but mandatory under the holding in *Baker v. Carr*, *supra*."

C. INsofar AS SECTION 6830(c) MAY HAVE PREVENTED APPELLANTS FROM BEING CANDIDATES, SUCH WAS PROPER TO INSURE PARTY INTEGRITY. THE SAME PRINCIPLES ARE APPLICABLE TO SECTION 6830(d)

As pointed out initially, California's election laws present a reasoned intermeshing of primary and general election laws. Section 6830(c),³ insofar as it prevents candidates for independent nomination as well as their signatories from having voted in the primary election, is part and parcel of a group of statutes which insure party integrity and thus the preservation of our party system. It must be read in context as a part of the entire group of such statutes. The same reasoning applies to section 6830(d).

Section 6401 of the primary law requires a party nominee to have been affiliated with his party for three months prior to filing his nomination papers, and with no other *qualified party* for one year. The corollary provision is section 6830(d) requiring that an independent nominee also not have been registered with a qualified party for one year immediately preceding the primary election.

3. The Secretary of State, as pointed out by appellant *Storer* took the position below that this subdivision did not bar *Storer* and *Frommshagen* from candidacy on the theory that the primary election is essentially a separate primary election for each party, and a separate one for independents who vote on nonpartisan matters. See *Schostag v. Cator*, 151 Cal. 600, 603-04; 91 Pac. 502, 503 (1907). Therefore, on such theory, an independent would not have voted at a partisan primary. The three judge federal court, however, read section 6830(c) literally.

Section 6402(a) of the primary law, and section 6801 of the independent nomination procedure both prohibit a candidate who was defeated in a partisan primary from being an independent candidate.

Section 6611 of the primary law prohibits a candidate who fails to receive his own party's nomination from being the candidate of any other political party.

And as already discussed in the previous section, section 6430(c) prevents persons who have voted in a primary from being signatories for independent candidates at the general election.

These sections in their totality achieve not only the compelling State interest against "party hopping" but also prevent "*party splintering*", an obvious compelling interest of the State. In short, in their totality, these sections serve the compelling State interests of insuring that the party system does not disintegrate.

In holding a "24 month rule" constitutional as to party candidates, the Court in *Bendinger v. Ogilvie*, 335 F.Supp. 572 (N.D. Ill. 1971, three-judge court) set forth perhaps the finest exposition of the party integrity concept and noted that "... the keystone of our democracy is the party system of politics" and that "Without rules like the '24 month rule', party swapping and changing might conceivably become so prevalent that the average political party could no longer function properly." *Id.* at 575.

See also *Williams v. Rhodes*, *supra*, 393 U.S. 23, 31-32 (1968), implicitly recognizing the importance of the party system so long as two parties do not retain a permanent monopoly. Two parties have no monopoly in California.

Also, as recently as February 1968, the California Supreme Court held section 6401 constitutional in an unreported memorandum decision. *Peace and Freedom Party, etc., et al., v. Jordan as Secretary of State, et al.*, Sac. 7821.

D. THE TWENTY-FOUR DAY REQUIREMENT FOR OBTAINING SIGNATURES SUSTAINS THE COMPELLING STATE INTEREST OF PERMITTING VOTERS TO DECIDE WHETHER THEY SHOULD SUPPORT INDEPENDENTS

Under the provisions of section 6833 in 1972 independent nomination papers were required to have been circulated between August 15 and September 8 for the November 7 general election.

"... Obviously some time limit is required as a practical matter to assure that only qualified signatures are obtained *and that the petitions reflect current attitudes of voters . . .*" (Emphasis added.)

Moore v. Board of Elections for District of Columbia, 319 F. Supp. 437, 440-41 (D.D.C. 1970, three-judge court) upholding 54 day circulation requirement. See also *Raza Unida Party v. Bullock*, *supra*, 349 F. Supp. 1272, 1280-1281 (W.D. Tex. 1972, three-judge court).⁴

The party nominees are not certified by the Secretary of State until after his official canvass, and the filing of campaign statements by candidates. Under the timing of the California Elections Code this last year (the dates will vary depending upon the primary date), this was July 15, 1972. California Government Code §§ 3750-3754; Elections Code §§ 11563-11565, 18471 and 6619.

Thereafter, and dependent upon the final determination of the nominees to ascertain the delegates thereto, State conventions are held in August at which party platforms are formulated. See generally §§ 8000, 8511, 8514, 8570, 8602, 9010, 9011, 9013, 9075 and 9102.

It is certainly compelling that the candidates be officially designated and party platforms announced before voters decide whether to support existing party candidates or in-

4. *People's Party v. Tucker*, 347 F.Supp. 1 (M.D. Pa. 1972, three-judge court), relied upon by appellants fails to give proper recognition to the fact that the Communist Party met the 24 day requirement, and also fails to follow the *totality* approach of *Jennens v. Forston*. See dissenting opinion, *Id.* at 6, n. 6, 6-7.

dividuals desiring to run as independents. In California, as in Washington, D.C.,

"... There is no restriction as to when a candidate, whether he stands in a primary or as an independent in the general election, may declare his candidacy and no time restriction on political activity. Indeed any candidate may solicit promises of signatures for his petition well before the permissible date for obtaining actual signatures."

Moore v. Board of Elections for District of Columbia, supra, 319 F.Supp. at 438.

The time after September 8, 1972 was required for checking signatures and preparing for the election. It is to be emphasized that in California, absentee voting starts 29 days before the date of the general election. All candidates must be determined and ballots ready for such purpose by that time. In 1972, such date was October 10, 1972, § 14620 *et seq.*

III. Section 6830(d) Does Not Place an Additional Qualification Upon a Congressional Candidate

At least under California law, section 6830(d) requiring an independent nominee to file a statement that he has not been affiliated with a qualified party for one year does not add an additional qualification for office in violation of article I, section 2 of the United States Constitution.

Apparently, the three judge court in the instant matters considered this contention so unsubstantial as to not even allude to it in its opinion.

Appellants in *Storer* misconstrue the differences between a qualification for office, and a qualification for independent candidacy. So long as an individual remains capable of being a write-in candidate, the Federal Constitution is in no way violated.

"The issue here is whether the... [appellants were] entitled to have... [their] name printed on the ballot nominated by petition... The question is not whether

... [they] may be a candidate. . . . and if electors write . . . [their] name on the ballot in sufficient numbers . . . [they] will be elected. . . ."

See *State v. Swanson*, 257 N.W. 255, 256 (Neb. 1934) *Cf. Roberts v. Cleveland*, 149 P.2d 120 (N.M. 1944). In fact, this distinction has been noted by a three judge federal court in *Stack v. Adams*, 315 F.Supp. 1295, 1298 (N.D.Fla. 1970, three-judge court). Only if the law provides an *absolute disqualification* from candidacy will article I, section 2 be violated.

In fact *Dillon v. Florina*, 340 F.Supp. 729 (D.N.M. 1972, three-judge court) solely relied upon by appellants in *Storer* in their jurisdictional statement, in no way indicated that the excluded candidate could have been a write-in candidate. Additionally, *every case* relied upon by the court in *Dillon* for its holding was a case which involved an *absolute disqualification* as to being a candidate for federal office. *Id.* at 731. Such is not the case in California.

IV. Appellants' Arguments in Storer and Hall Are Lacking in Merit

It is believed that the foregoing exposition of the facts and the law traverses all significant contentions raised in the *Storer* and *Hall* appeals. We, however, wish to comment on several of the major contentions presented to demonstrate their lack of merit specifically, and of all the appeals herein generally.

In *Storer* and *Hall* the astonishing position is taken that independent candidates, who run at the *general election*, should only have to have the same number of signatures as party candidates who run at the *primary election*. This attempt to compare apples and oranges should be obvious. Parties qualified under section 6430 have already demonstrated substantial support with the electorate. An independent has yet to do so. Therefore, potential party nomi-

nees need not do so further. The facts of political life will narrow the primary field. Also, the primary candidate must *win* at the primary election before his name can be printed on the ballot. If an independent could have his name printed on the ballot with the same number of signatures as a primary candidate, this would invidiously discriminate against all the primary candidates who failed to win their party's nomination. As this Court has pointed out in *Jenness v. Forston*, *supra*, 403 U.S. 431, 442 (1970) in reply to an analogous argument:

"... Georgia has not been guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot. Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike, a truism well illustrated in *Williams v. Rhodes*, *supra*.

In *Storer* and *Hall*, the position is also taken unqualifiedly that "... no one has ever been able to satisfy the statutory requirements for independent candidacy." Jurisdictional Statement, pp. 9-10. Have appellants examined all the records of the Secretary of State since the procedure was first instituted in the 19th century? To our knowledge, they have not. In fact an individual *qualified and ran as an independent* for State Assembly, 40th District, at the November 1972 General Election.⁵ The Secretary of State has not undertaken to examine all his records to attempt to disprove this assertion of the appellants. Other examples perhaps might be uncovered. In *Baird v. Davoren*, *supra*, 346 F.Supp. 515 (D.Mass. 1972, three-judge court) the court upheld the independent nomination procedure against the contentions that only twice in 33 years had independent

5. Certified List of Candidates, General Election, November 1972, Compiled by Edmund G. Brown, Jr., Secretary of State. This is not reflected in the record below, but is a matter subject to judicial notice.

candidates qualified for the ballot. Thus, where alternative means of access to candidacy exist, difficulty is not the equivalent of unconstitutionality.

Also, appellants' statement that 70 percent of the electorate are automatically disqualified from signing nomination petitions presupposes the obvious erroneous position that 70 percent of the total electorate registered for the general election [they need not have necessarily been registered at the primary] vote at the primary election for every office. Our position below was that in the Congressional Districts involved herein, based upon registration figures, the pool of potential signatories was closer to 50 percent of the electorate than the 30 percent claimed by *Storer* and *Fromm* *hagen*.

Insofar as appellants argue that their case is not the same as the "party hopping" cases in that there is no "independent loyalty" we merely point out the obvious. If a state may require party membership *for candidacy* to insure party loyalty for one or two years, by a parity of reasoning it can require *nonparty* membership for a like period to insure true independent status and prevent party splintering and possible disintegration of the party system, which is essential to the preservation of our political life and democracy as we know it.

V. Appellant Fromm *hagen's* **Additional Arguments Are Lacking in Merit**

Basically, all the foregoing with relation to *Storer* and *Hall* is also applicable to *Fromm* *hagen's* appeal. However, *Fromm* *hagen* in his jurisdictional statement presents "additional argument." It is submitted that such additional argument has already been traversed. Such "additional argument's" main thrust merely indicates the obvious. There are distinctions between a party candidate at a pri-

mary election, and an aspiring independent at a general election. There are also distinctions between a party's single nominee who wins at the primary election and an aspiring independent at the general election. However, as this Court emphasized in *Jenness v. Forston*, *supra*, 403 U.S. at 442, this is the case. They need not be treated the same. Different logistics are required where a state, such as California, has a system of primary elections for the nomination of general election candidates:

“... Indeed the requirements are different. But in a system where political primaries are an appropriate means of candidate nominations they rightfully should be different. . . .”

Jackson v. Ogilvie, *supra*, 325 F.Supp. 864, 868 (N.D.Ill. 1971, three judge court) *aff'd mem*, 403 U.S. 925 (1971).

Thus differences as to treatment as to when papers are filed, who are considered “qualified candidates” for purposes of section 315 of the Federal Communication Act of 1934, see section 57, and the treatment accorded candidates by the news media generally are merely part and parcel of the legal and practical differences in the logistics of political life.

Appellant *Frommhagen* may declare his candidacy any time he desires for 1974. In fact, he indicates that he has already done so: See page 5 of his jurisdictional statement. If *Frommhagen*'s disaffection with the major parties specifically, and the party system generally is so great, California law permits him reasonable alternative measures to espouse his disaffection and associate with whomsoever he may desire to band together to gain access to the California electoral system.

CONCLUSION

The questions presented by these appeals are not substantial. Appellee Edmund G. Brown, Jr., Secretary of State of the State of California, moves that the decision of the three judge court be affirmed.

Respectfully submitted,

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(Appendices Follow)

Appendix A

California Elections Code Provisions Defining Qualified Parties—Also Signature Requirements

§ 6430. Qualified parties

“A party is qualified to participate in any primary election:

(a) If at the last preceding gubernatorial election there was polled for any one of its candidates who was the candidate of that party only for any office voted on throughout the State, at least 2 percent of the entire vote of the State; or

(b) If at the last preceding gubernatorial election there was polled for any one of its candidates who, upon the date of that election, as shown by the affidavits of registration of voters in the county of his residence, was affiliated with that party and was the joint candidate of that party and any other party for any office voted on throughout the State, at least 6 percent of the entire vote of the State; or

(c) If on or before the 135th day before any primary election, it appears to the Secretary of State, as a result of examining and totaling the statement of voters and their political affiliations transmitted to him by the county clerks, that voters equal in number to at least 1 percent of the entire vote of the State at the last preceding gubernatorial election have declared their intention to affiliate with that party; or

(d) If on or before the 135th day before any primary election, there is filed with the Secretary of State a petition signed by voters, equal in number to at least 10 percent of the entire vote of the State at the last preceding gubernatorial election, declaring that they represent a proposed party, the name of which shall be stated in the petition, which proposed party those voters desire to have partici-

pate in that primary election. This petition shall be circulated, signed, verified and the signatures of the voters on it shall be certified to and transmitted to the Secretary of State by the county clerks substantially as provided for initiative petitions. Each page of the petition shall bear a caption in 18-point blackface type, which caption shall be the name of the proposed party followed by the words "Petition to participate in the primary election." No voters or organization of voters shall assume a party name or designation which is so similar to the name of an existing party as to mislead voters.

Whenever the registration of any party which qualified in the previous direct primary election falls below one-fifteenth of 1 percent of the total state registration, that party shall not be qualified to participate in the primary election but shall be deemed to have been abandoned by the voters, since the expense of printing ballots and holding a primary election would be an unjustifiable expense and burden to the State for so small a group. The Secretary of State shall immediately remove the name of the party from any list, notice, ballot, or other publication containing the names of the parties qualified to participate in the primary election."

§ 6495. Number of sponsors required

"The number of sponsors required for the respective offices are as follows:

(a) State office or United States Senate, not less than 65 nor more than 100.

(b) House of Representatives in Congress, State Senate or Assembly, Board of Equalization, or any office voted for in more than one county, and not statewide, not less than 40 nor more than 60.

(c) Candidacy in a single county or any political subdivision of a county, other than State Senate or Assembly, not less than 20 nor more than 30.

(d) When any political party has less than 50 voters in the state or in the county or district in which the election is to be held, one-tenth the number of voters of the party.

(e) When there are less than 150 voters in the county or district in which the election is to be held, not less than 10 nor more than 20."

§ 6080. "Basis of percentage" (Presidential Primary)

"As used in this article, 'basis of percentage' means:

(a) If a party's candidate for Governor was the candidate of the party alone, the vote polled for the party's candidate for Governor at the last preceding general election at which a Governor was elected.

(b) If a party's candidate for Governor was not the candidate of that party alone, the vote polled at the last preceding general election by that one of the party's candidates voted on throughout the State who received the greatest number of votes of all of the party's candidates who were the candidates of that party alone.

(c) If a party had no candidate voted on throughout the State who was the candidate of that party alone, the vote polled at the last preceding general election by that one of the party's candidates voted on throughout the State who received the greatest number of votes of all the party's candidates who were the candidates of the party in conjunction with one or more other parties."

§ 6082. Signatures on nomination papers (Presidential Primary)

"Nomination papers for candidates for delegates of any party shall be signed by not less than one-half of 1 percent and not more than 2 percent of the vote constituting the basis of percentage."*

*See also §§ 6345 and 6347 for similar requirements applicable solely to Democratic Party.

Appendix B

California Elections Code Provisions Providing for Write-in Candidates

§ 6260. Ballot; space for write-in

"Notwithstanding any other provisions of law, a space shall be provided on the presidential primary ballot for an elector to write in the name of a candidate for President of the United States."

§ 6261. Candidate's endorsement of candidacy; filing

"Any person who believes his name may be used as a write-in candidate for President of the United States shall, not later than eight days before the primary election, file his endorsement of his write-in candidacy with the Secretary of State, or no votes shall be counted for him."

§ 6262. Delegates to national convention; selection by candidate

"Any person who receives, by write-in vote, a plurality of the votes cast for President of the United States shall, within 10 days after the primary election, file a list of delegates to the national convention of his political party with the Secretary of State in the manner prescribed in Sections 6053 and 6054."

§ 6263. Delegates to national convention; selection by state central committee

"If the candidate fails to file a list of delegates, the state central committee of the party in whose primary the candidate received the plurality vote shall within 10 days of the end of the 10-day period required in Section 6262, file a list of delegates with the Secretary of State. The delegation shall go to the convention unpledged to any candidate."

§ 10213. Ballot size

"A ballot shall not exceed 24 inches in length, and shall be three inches in width and as many times that width as may

be necessary to contain all of the names of candidates nominated, with proper blank spaces to allow the voter to write in names not printed on the ballot. The ballot shall also contain a separate column or columns of sufficient width for statements of all measures submitted to the voters."

§ 10229. Instructions to voters; presidential electors; party electors

"In elections when electors of President and Vice President of the United States are to be chosen, there shall be placed upon the ballot, in addition to the instructions to voters as provided in this article, an instruction as follows: 'To vote for all of the electors of a party, stamp a cross (+) in the square opposite the names of the presidential and vice presidential candidates of that party. A cross (+) stamped in the square opposite the name of a party and its presidential and vice presidential candidate, is a vote for all of the electors of that party, but for no other candidates.' This instruction shall appear immediately before the words: 'To vote for a person not on the ballot.'

If a group of candidates for electors has been nominated under the provisions of Chapter 3 (commencing at Section 6800) of Division 5, and has under the provisions of Article 1 (commencing at Section 6800) of that chapter designated the names of the candidates for President and Vice President of the United States for whom those candidates have pledged themselves to vote, the instructions to voters shall also contain the following:

'To vote for those electors who have pledged themselves to vote for a candidate for President and Vice President not supported by any particular party stamp a cross (+) in the square opposite the names of those presidential and vice presidential candidates.'

If a group of candidates for electors has been nominated by a party not qualified to participate in the election, the instructions to voters shall also contain the following:

'To vote for those electors who have pledged themselves to vote for a candidate for President and for Vice President of any party not qualified to participate in the election write in the names and party of those presidential and vice presidential candidates in the blank space provided for that purpose.'

The names of presidential and vice presidential candidates and a list of presidential electors of nonqualified political parties shall be filed with the Secretary of State at least 60 days prior to the election."

§ 18600. Write-in votes

"Any name written upon a ballot shall be counted, unless prohibited by Section 18603, for that name for the office under which it is written, if it is written in the blank space therefor, whether or not a cross (+) is stamped or made with pen or pencil in the voting square after the name so written."

§ 18601. Declaration required

"Every person who desires to have his name as written on the ballots of an election counted for a particular office shall file a declaration stating that he is a write-in candidate for the nomination for or election to the particular office and giving the title of that office."

§ 18602. Declaration; filing

"The declaration required by Section 18601 shall be filed no later than the eighth day prior to the election to which it applies. It shall be filed with the clerks, registrar of voters, or district secretary responsible for the conduct of the election in which the candidate desires to have write-in votes of his name counted."

§ 18603. Requirements for tabulation of write-in vote

"No name written upon a ballot in any state, county, city, city and county, or district election shall be counted for an office or nomination unless

(a) A declaration has been filed pursuant to Sections 18601 and 18602 declaring a write-in candidacy for that particular person for that particular office or nomination and

(b) The fee required by Section 6555 is paid when the declaration of write-in candidacy is filed pursuant to Section 18602."

§ 18604. Write-in votes in primary election

"In a primary election, write-in votes shall be counted for each person whose name appears on a ballot as a candidate for nomination for the same office by another party, notwithstanding his failure to comply with the provisions of Sections 18601, 18602, and 18603."

Appendix C

California Elections Code Provisions—Direct Primary Law—Relating to Party Integrity

§ 6401. Party affiliation

"No declaration of candidacy for a partisan office or for membership on a county central committee shall be filed, either by the candidate himself or by sponsors on his behalf, (1) unless at the time of presentation of the declaration and continuously for not less than three months immediately prior to that time, the candidate is shown by his affidavit of registration to be affiliated with the political party the nomination of which he seeks, and (2) the candidate has not been registered as affiliated with a political party other than that political party the nomination of which he seeks within 12 months immediately prior to the filing of the declaration.

The county clerk shall attach a certificate to the declaration of candidacy showing the date on which the candidate registered as intending to affiliate with the political party the nomination of which he seeks, and indicating that the candidate has not been affiliated with any other political party for the 12-month period immediately preceding the filing of the declaration."

§ 6402. Independent nominees

"This chapter does not prohibit the independent nomination of candidates under the provisions of Chapter 3 (commencing at Section 6800) of this division, subject to the following limitations:

(a) A candidate whose name has been on the ballot as a candidate of a party at the direct primary and who has been defeated for that party nomination is ineligible for nomination as an independent candidate. He is also ineligible as a candidate named by a party central committee to fill a vacancy on the ballot for a general election.

(b) No person may file nomination papers for a party nomination and an independent nomination for the same office, or for more than one office at the same election."

§ 6611. Unsuccessful candidate; ineligibility as candidate of another party

"A candidate who fails to receive the highest number of votes for the nomination of the political party with which he was registered as affiliated on the date his declaration of candidacy or declaration of acceptance of nomination was filed with the county clerk cannot be the candidate of any other political party."

Appendix D

California Elections Code Provisions—Independent Nomination Procedure—Including Those Relating to Party Integrity

§ 6800. Scope of chapter

“A candidate for any public office, including that of presidential elector, for which no nonpartisan candidate has been nominated or elected at any primary election, may be nominated subsequent to or in lieu of a primary election pursuant to this chapter.”

§ 6801. Defeated partisan candidates

“A candidate for whom a nomination paper has been filed as a partisan candidate at a primary election, and who is defeated for his party nomination at the primary election, is ineligible for nomination as an independent candidate.”

§ 6803. Group of candidates for presidential electors; designation of presidential and vice presidential candidates

“Whenever a group of candidates for presidential electors, equal in number to the number of presidential electors to which this State is entitled, files a nomination paper with the Secretary of State pursuant to this chapter, the nomination paper may contain the name of the candidate for President of the United States and the name of the candidate for Vice President of the United States for whom all of those candidates for presidential electors pledge themselves to vote.”

§ 6804. Printing of names on ballot

“When a group of candidates for presidential electors designates the presidential and vice presidential candidates for whom all of the group pledge themselves to vote, the names of the presidential candidate and vice presidential candidate designated by that group shall be printed on the

ballot pursuant to Article 1 (commencing at Section 10200) of Chapter 2 of Division 7."

§ 6830. Contents

"Each candidate or group of candidates shall file a nomination paper which shall contain:

(a) The name and residence address of each candidate, including the name of the county in which he resides.

(b) A designation of the office for which the candidate or group seeks nomination.

(c) A statement that the candidate and each signer of his nomination paper did not vote at the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper. The statement required in this subdivision shall be omitted when no candidate was nominated for the office at the preceding primary election.

(d) A statement that the candidate is not, and was not at any time during the one year preceding the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper, registered as affiliated with a political party qualified under the provisions of Section 6430. The statement required by this subdivision shall be omitted when no primary election was held to nominate candidates for the office to which the independent nomination paper is directed."

§ 6831. Signatures required

"Nomination papers shall be signed by voters of the area for which the candidate is to be nominated, not less in number than 5 percent nor more than 6 percent of the entire vote cast in the area at the preceding general election. Nomination papers for Representative in Congress, State Senator or Assemblyman, to be voted for at a special election to fill a vacancy, shall be signed by voters in the district

not less in number than 500 or 1 percent of the entire vote cast in the area at the preceding general election, whichever is less, nor more than 1,000."

§ 6833. Time for filing, circulation and signing; verification

"Nomination papers required to be filed with the Secretary of State or with the county clerk shall be filed not more than 79 nor less than 54 days before the day of the election, but shall be prepared, circulated, signed, verified and left with the county clerk for examination, or for examination and filing, no earlier than 84 days before the election and no later than 5 p.m. 60 days before the election. If the total number of signatures submitted to a county clerk for an office entirely within that county does not equal the number of signatures needed to qualify the candidate, the county clerk shall declare the petition void and is not required to verify the signatures. If the district falls within two or more counties, the county clerk shall within two working days report in writing to the Secretary of State the total number of signatures filed. If the Secretary of State finds that the total number of signatures filed in the district or state is less than the minimum number required to qualify the candidate he shall within one working day notify in writing the counties involved that they need not verify the signatures."



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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1972

Supreme Court, U. S.
FILED

APR 14 1973

MICHAEL RODAK, JR., CLERK

THOMAS TONE STORER, et al.,
(LAWRENCE FROMMHAGEN, et al.,
Plaintiff-Intervenor),

Petitioners,

vs.

EDMUND G. BROWN, JR., et al.,

Respondents.

GUS HALL, et al.,

Petitioners,

vs.

EDMUND G. BROWN, JR.,

Respondent.

**MOTION FOR LEAVE TO
INTERVENE AMICUS CURIAE ON
BEHALF OF APPELLANTS**

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MOTION FOR LEAVE TO
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Now comes the Committee for Democratic Election Laws (CoDEL) and files this Motion pursuant to Rule 42 and shows as follows:

1. That the Committee for Democratic Election Laws represents a broad cross section of citizens concerned with election laws which impede the democratic process. Petitioner's activities include providing legal representation in cases challenging election laws; providing expert testimony on election laws in legal challenges to election laws; providing a voice for its constituents before legislatures concerning laws dealing with the electoral process and in providing information regarding a variety of issues touching on the electoral process, such as the struggle for bi-lingual ballots and to facilitate voter registration.

2. Petitioner seeks leave to file a brief on

the following question:

Is the California requirement that independent candidates collect signatures equaling 5% of the registered voters unconstitutional in and of itself even in the absence of the present restrictions complained of by the Appellants.

Petitioner will contend that in the demographic context of California, the 5% requirement, in and of itself, is an effective bar to independent candidates gaining ballot status.

In essence Petitioner will seek to show that the 5% requirement in California is statistically and practically a qualitatively greater burden than the 5% requirement approved by this Court in Jeness v Fortson, 463 US 431, 91 S Ct 1970(1968).

3. Petitioner feels that this issue will not be adequately briefed by Appellants since the Appellants have expressly indicated that they do not intend to contest the constitutionality of a simple 5% requirement without the additional requirements Appellants complain of. Petitioner has obtained the consent of Appellants to this

Motion and attach hereto a copy of same.

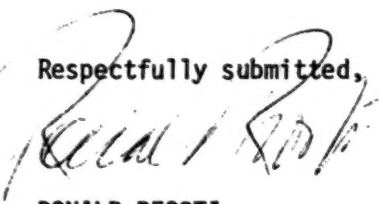
4. Petitioner contends that the issue they seek to raise is relevant because:

a) If this Court decides in favor of Petitioner's position this would dispose of the case.

b) If this Court should hold for Appellants without ruling on the issue presented by Petitioner, the Petitioner is fearful that independent candidates would continue to be under an unconstitutional burden in obtaining ballot status, because the California 5% requirement, in and of itself, even in the absence of the additional burdens challenged by Appellants, will continue to represent a qualitatively greater burden than the 5% requirement approved in Georgia.

WHEREFORE, for the foregoing reasons,
Petitioner, the Committee for Democratic Election
Laws (CoDEL), seeks leave to file a Brief in
Support of Appellants on the issue presented
above.

Respectfully submitted,



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DATED: April 12, 1973

ACLU FOUNDATION OF NORTHERN CALIFORNIA, INC.

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ASSOCIATE STAFF COUNSEL


April 5, 1973

THE FOUNDATION IS AFFILIATED WITH BUT SEPARATE FROM THE AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA

Dear Ronald Reosti:

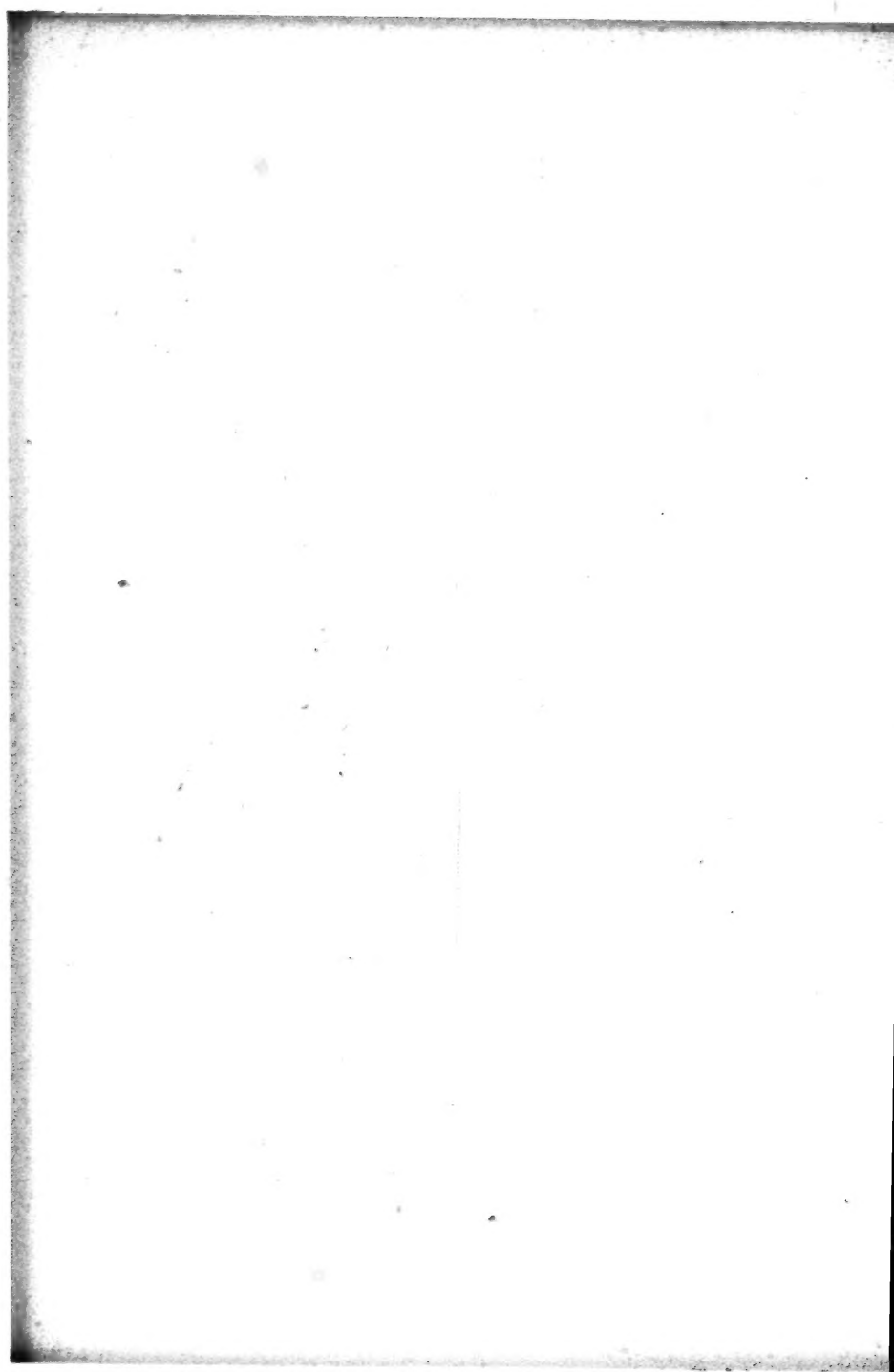
We would be delighted to have you file an amicus brief
in Storer vs. Brown and Hall vs. Brown. I would appreciate
copies of your correspondence with the Court on the matter.
We will send you a copy of our brief as soon as it is filed.

Sincerely,


Joseph Bencho
Staff Counsel

JR:dvd

cc: Paul N. Halvonik, Esq.



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SUPREME COURT OF THE UNITED STATES

October Term 1972

THOMAS TONE STORER, et al.,)
(LAWRENCE FROMMHAGEN, et al.,)
Plaintiff-Intervenor,)

Petitioners,)

-vs-)

EDMUND G. BROWN, JR., et al.,)

Respondents.)

GUS HALL, et al.,)

Petitioners,)

-vs-)

EDMUND G. BROWN, JR.,)

Respondent.)

AMICUS CURIAE
BRIEF ON BEHALF OF
APPELLANTS

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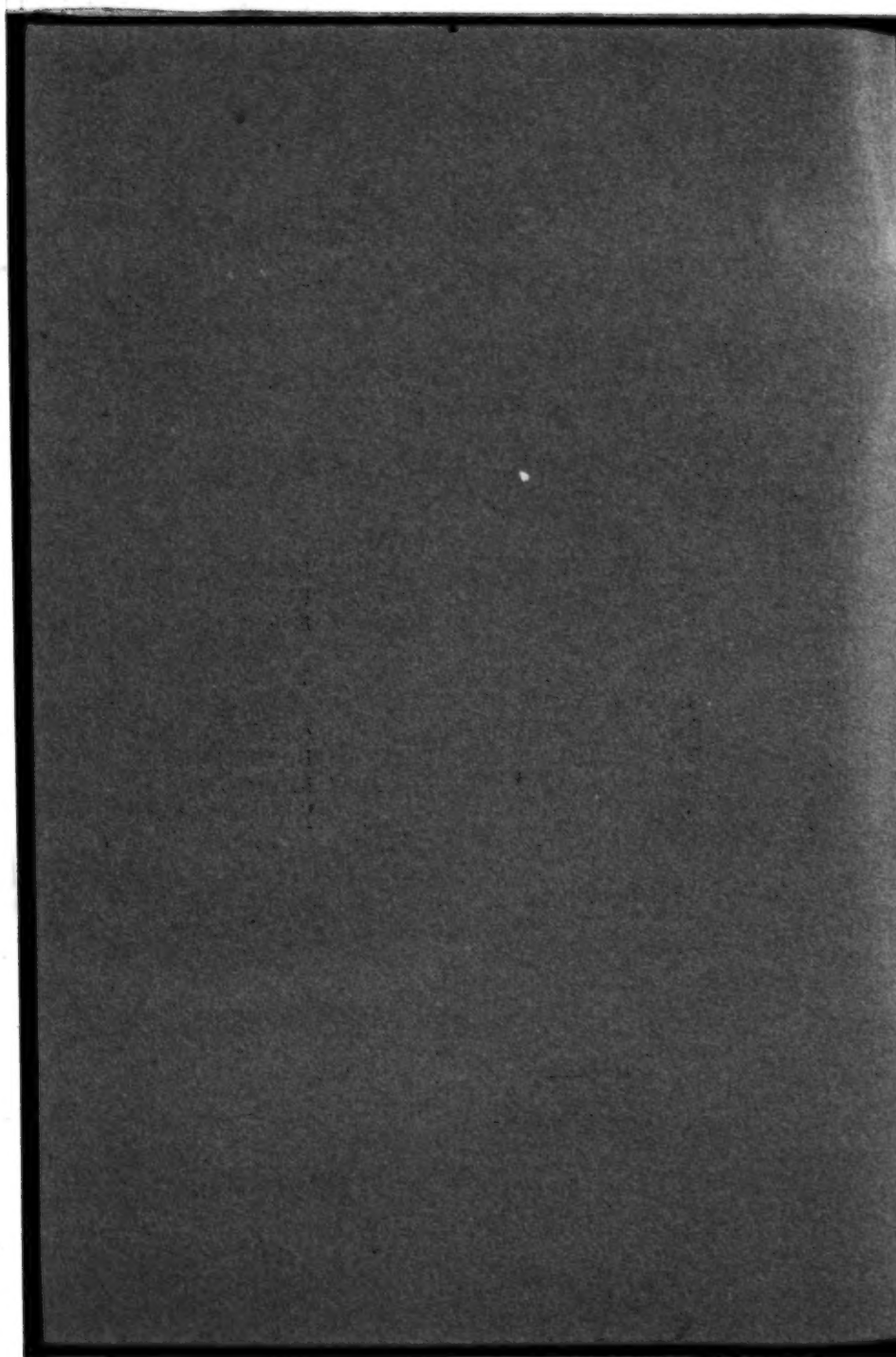


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AMICUS CURIAE
BRIEF ON BEHALF OF
APPELLANTS

Interest of Amicus Curiae

The Committee for Democratic Election Laws (CoDEL) represents a broad cross section of citizens concerned with election laws which impede the democratic process. Intervenor's activities include providing legal representation in cases challenging election laws; providing expert testimony on election laws in legal challenges to election laws; providing a voice for its constituents before legislatures concerning laws dealing with the electoral process and in providing information regarding a variety of issues touching on the electoral process, such as the struggle for bi-lingual ballots and to facilitate voter registration.

CoDEL believes that California's 5% requirement unduly burdens the rights of citizens to vote and to associate in political parties.

Summary of Argument

Amicus Curiae files this Brief in support of the Appellants' contention that the California Election Code, as applied to independent candidates is unconstitutional. More specifically, Amicus Curiae contends that Section 6831 of said Code requiring independent candidates to submit nominating papers equal to five percent (5%) of the entire vote in the preceding general election is unconstitutional regardless of whatever restrictions California imposes on the collection of this number of petitions.

Five percent requirements have proven in practice to represent a burden on

voting and associational rights. In 1972 no candidate qualified for the ballot by petitioning in any state have a 5% requirement.

When candidates have qualified for ballot status by submitting this number of petitions it was due to exceptional circumstances and did not reflect the fairness of the requirement.

California's five percent requirement is qualitatively greater a burden on voting and associational rights than is Georgia's five percent requirement due to the costs of gathering the requisite number of signatures in California.

ARGUMENT

IN THE DEMOGRAPHIC CONTEXT OF CALIFORNIA, THE 5% REQUIREMENT, IN AND OF ITSELF, IS AN EFFECTIVE BAR TO INDEPENDENT CANDIDATES GAINING BALLOT STATUS. IN ESSENCE, THE 5% REQUIREMENT IN CALIFORNIA IS

A QUALITATIVELY GREATER BURDEN
THAN THE 5% REQUIREMENT APPROVED
BY THIS COURT IN JENESS V FORTSON,
463 US 431, 91 S CT 1970 (1971).

This Court has held unconstitutional election laws which "in effect tends to give [the Democratic and Republican parties] a complete monopoly" Williams v Rhodes, 393 US 23, p 32; 89 S Ct 5, p 11 (1968).

Historically, requirements that candidates obtain petitions equal to 5% of the voters have operated to exclude independents and "third" parties from the ballot. Candidates have qualified under such provisions only under exceptional circumstances. For instance, those candidates mentioned by this Court in Jeness v Fortson, 403 US 431, p 439; 91 S Ct 1970, p 1974 (1971) both had significant associations with either the Republican or Democratic party. In 1972 no candidate qualified by petitioning for

ballot status in any of the states having a five percent requirement (Georgia, California, Montana, Nevada, Wyoming).

In fact, our research indicates that since 1948, no third party, except for the American Independence Party, has gained ballot status in these states. (We did not research this question beyond 1948)

In addition it has been reported that the American Independence Party spent Three Million (\$3,000,000.00) Dollars in order to qualify in all 50 states. In California the cost was Five Hundred Thousand (\$500,000.00) Dollars.¹

In California the five percent requirement represents an insurmountable barrier to independent candidates gaining ballot status due to the enormous effort required to collect the requisite number

1. Financing The 1968 Election, Herbert E. Alexander, D.C. Heath and Co., Lexington, Mass., 1971

of signatures. In 1972, 8,595,950 citizens voted in California.

A successful independent candidate would have to collect petitions equal to at least 6% of these voters in order to insure meeting the minimum requirement. Six percent would total 515,757 signatures.

The attached affidavit indicates an estimation of the monetary costs and the number of volunteers needed to meet this requirement. The experience of the American Independence Party quoted above would indicate that this figure is not unreasonable.

However, even if we were to assume that the requisite number of signatures could be collected for one-half the costs in terms of money and time, it is clear that the burden placed on independent candidates is such as to allow only the wealthiest to qualify.

It is important to note that we are

discussing the requirements of an independent candidate and more importantly the requirements such a person must meet prior to becoming an official candidate. Common knowledge and experience indicate that in raising money and support for a candidacy, official status as a bona fide candidate is crucial. In California, an independent is faced with the task of raising in excess of One Hundred Thousand (\$100,000.00) Dollars merely to qualify.

Because of population differences this figure is approximately five times the amount required in Georgia. Although Intervenor is of the opinion that experience has shown that even Twenty Thousand (\$20,000.00) Dollars is too great a burden for an independent or almost any third party, Intervenor also contends that there is a qualitative difference between raising Twenty Thousand (\$20,000.00) Dollars and One Hundred Thousand (\$100,000)

Dollars regardless of the number of potential contributors.

The facts of life are that the initial "seed" money required to raise money from a larger audience is much greater than that required to raise a proportionately smaller sum from a smaller audience.

It is conceivable (though hardly probable) that an independent or a third party could raise Twenty Thousand (\$20,000) Dollars without investing a sizable amount of money. To think that more than One Hundred Thousand (\$100,000) Dollars could be raised without a sizable investment is inconceivable unless the fund raiser had access to very wealthy contributors.

Accordingly, Intervenor repeats that the financial burden of meeting the California petition requirement will of necessity disqualify all but the most wealthy or those who have the support of

the wealthy.

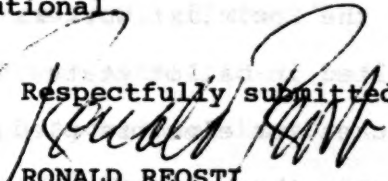
Restricting candidacy to the wealthy or to those who have the support of the wealthy is clearly unconstitutional.

Bullock v Carter, 405 US 134 (1972).

CONCLUSION

Section 6831 of California's Election Code, standing by itself, constitutes such a burden on voting and associational rights as to constitute an invidious discrimination. Accordingly, said section should be declared unconstitutional.

Respectfully submitted,


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DATED: May 25, 1972 1 - 313 - 965 - 3464

APPENDIX

AFFIDAVIT OF LARRY SEIGLE

STATE OF NEW YORK)

:SS.

COUNTY OF NEW YORK)

LARRY SEIGLE, being duly sworn,
deposes and says:

1. I was the National Campaign Manager of the Socialist Workers Party 1972 presidential campaign.
2. During the course of that campaign, I personally supervised the ballot effort of the Socialist Workers Party which resulted in ballot status for our presidential ticket, or electors pledged to them, in twenty-three states.
3. As part of accomplishing this task, supporters of our party collected in excess of 500,000 signatures on nominating petitions, more than any other party in 1972.

4. While our party did achieve ballot status in twenty-three states, we did not achieve ballot status in California, nor did we attempt such an effort, because of our assessment that such an attempt would be futile given the impossible financial burden of collecting the signature requirement.

5. In considering whether or not to attempt ballot status, and in organizing any such effort, the following must be taken into account.

- a. Generally, double the amount of signatures required must be collected to assure that enough valid signatures have been obtained. Where a state imposes a maximum allowable that is less than double the requirement, as in California where a maximum of 6% may be submitted, extra

organizational effort must go into checking each signature before filing to assure that the signature is valid.

- b. In advance of the petitioning period, organizers must recruit petitioners and scout for good places to petition, where the flow of pedestrians will be sufficient to permit a maximum number of signatures to be collected.

- c. There is a saturation point, after which it becomes difficult to collect signatures in one given area. For this reason, signature gatherers must be spread out over a large area, which increases geographically in proportion to the number of signatures to be collected.

6. To place one statewide candidate running as an independent on the California ballot in 1974 would require signatures equal to 5% of the total number of persons who voted in 1972 (8,595,590), or 429,797 valid signatures. The maximum allowable to be submitted is 6%, or 515,757 signatures. To assure that enough valid signatures have been collected, petition organizers would have to shoot for collection of the maximum, or 515,757 signatures.
7. Based on our experience collecting signatures in 1972, the average number of signatures which will be collected in a full working day by a good petitioner is seventy (70). Not all these signatures will be valid, as many people do not know whether or not they are registered, and many will sign who voted in the primary election. (This factor will be offset by aiming for 6% rather than 5%)

8. By dividing 70 into the number of signatures we need to collect, 515,757, we can determine that 7,367 full work-days are required to collect the signatures.

9. Based on our experience in 1972, the same number of work-days are required to accomplish the task of scouting and checking the validity of signatures and sorting the petitions. Approximately half this work can be done by petitioners during hours in which they are not petitioning. Thus, approximately half the 7,367 work-days, or 3,684 additional work-days are required to complete the task of checking and sorting the petitions.

10. The total number of work-days required for both collecting signatures and checking signatures is 11,051.

11. Based on our experience in 1972, to collect half a million signatures, a minimum of ten headquarters disbursed

throughout the state will be required. Each headquarters will thus be responsible for the collection of 50,000 signatures in its geographic area. The headquarters must be maintained for a minimum of three months to allow for recruitment of petitioners, scouting for petitioning locations, and the petitioning itself. The expenses of the headquarters would be as follows:

Rent
\$250 per mo. x 3 mo = \$750 x 10 \$ 7,500

Telephone
\$75 per mo. x 3 mo = \$225 x 10 2,225

Office supplies \$100.00 x 10 1,000

1 full time office organizer
\$100/wk x 12 weeks x 10 12,000

12. Signature gatherers must be recruited.

At a minimum, the advertising budget of each headquarters would be \$1,000.

\$1,000 x 10 headquarters = \$10,000

13. Signatures would be collected and signatures would be checked for validity

by volunteers. However, minimum subsistence would have to be paid to transport, house and feed petitioners during the petition drive. When a petition period is short, as in this case, it becomes absolutely necessary to rely on full-time help for which a subsistence is required. A minimum of \$6.00 per person per day is needed for food, transportation, medical incidentals, etc.

$\$6.00 \times 11,051 \text{ work-days} = \$66,306$
This amounts to \$36.00 per week minimum subsistence for volunteers, and is only possible if all other personal expenses, such as entertainment, housing, clothing, etc., are not included. One cost factor not included is the loss of income to petitioners during the petition drive. If petitioners were working during this period and drawing \$20.00 a day from the job, their income during this period would be nearly a quarter million dollars.

14. Each headquarters will need a minimum of 500 petition boards upon which the petitions will be placed. This number will assure that the maximum number of volunteers may be utilized on Saturdays.

$$\begin{aligned} 500 \text{ board} \times \$1.00 \text{ each} \times 10 \text{ hg} &= \\ & \$5,000 \end{aligned}$$

15. Each headquarters will need to purchase from the state lists of registered voters from its geographic area for the purpose of checking to assure that enough valid signatures have been collected. The approximate cost of these lists is .50 per 1,000 names. This estimate is based on the cost in San Francisco county, and varies from county to county. There are 10,466,000 registered voters in California; however, organizers need purchase approximately half that number as the petitioning will be concentrated in ten centers.

$$5,233,000 \text{ names} \times .50/1000 = \$26,165$$

These lists will have to be duplicated to allow for use of more than one copy at a headquarters. Approximate cost for xeroxing is \$5,000.00.

16. One of the full-time organizers will need to travel between centers to coordinate the activity. Travel for this person will be approximately \$500.00.

17. Based on these figures, the minimum budget for conducting such a petition drive, when volunteer help is utilized, is \$135,696.00.

18. On information and belief, the McCarthy campaign -- last statewide campaign to make a serious if unsuccessful attempt to meet this requirement -- spent in excess of \$350,000 in 1968.

19. On information and belief, even if the period for collecting signatures in California were extended, the sheer financial burden of collecting the required number of signatures would make it

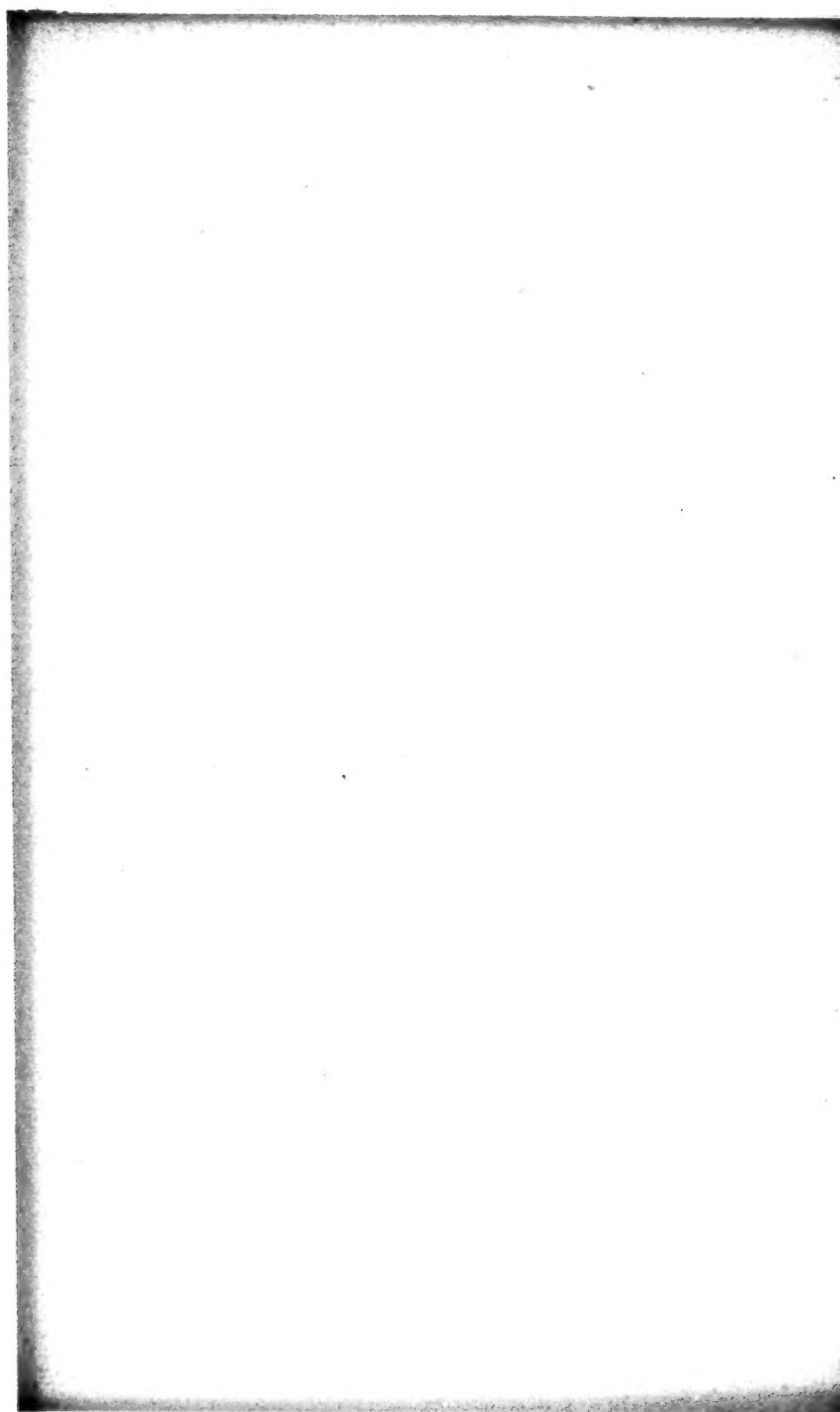
impossible to comply.

s/ Larry Seigle
Larry Seigle

Sworn to before me this 24th
day of May, 1973.

s/ Judith Baumann

Judith Baumann
Notary Public, State of New York
No. 31-0195298
Qualified in New York County
Commission Expires March 30, 1975



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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1972

No. 72-812

Supreme Court, U. S.
FILED

JUN 1 1973

MICHAEL RODAK, JR., CLERK

THOMAS TONE STORER, et al., *Appellants*,

VS.

EDMUND G. BROWN, JR., et al., *Appellees*.

GUS HALL, et al., *Appellants*,

VS.

EDMUND G. BROWN, JR., *Appellee*.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF APPELLANTS

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-812

THOMAS TONE STORER, et al., *Appellants*,

VS.

EDMUND G. BROWN, JR., et al., *Appellees*.

GUS HALL, et al., *Appellants*,

VS.

EDMUND G. BROWN, JR., *Appellee*.

On Appeal from the United States District Court
for the Northern District of California

BRIEF OF APPELLANTS

JURISDICTION

The jurisdiction of the court below was invoked pursuant to 42 U.S.C. §§1981, 1983, 1985(3) and 1988; 28 U.S.C. §§1331(a), 1343(4), 1357, 2201, 2202, 2281, and 2284; Article I, §2, Clause 2, of the United States Constitution; and the First and Fourteenth Amend-

ments to the United States Constitution. The judgment of the court below was entered on September 8, 1972, and notice of appeal was filed in that court on September 13, 1972. Probable jurisdiction was noted and the cases consolidated on March 5, 1973. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1253.

OPINION BELOW

The opinion of the District Court for the Northern District of California is as yet unreported; it is included in the Appendix at pp. 84-91.

QUESTIONS PRESENTED

1. Whether California Elections Code §§6830(c) and 6830(d) which, singly or in combination, operate to deny appellants their right to appear on the ballot, to nominate persons of their choice for the ballot and to vote for persons of their choice, violate the First and Fourteenth Amendments because they condition access to the ballot on unreasonable conditions supported by no legitimate state interest.

2. Whether California Elections Code §§6830(c) and 6830(d) further violate Article I, §2, Clause 2, of the United States Constitution by adding qualifications for the office of U.S. Congressman.

3. Whether California Elections Code §§6830(c), 6830(d), 6833, 6864 and 6831, which, singly or in com-

bined effect, make it impossible for an independent candidate to secure a place on the ballot, violate the First and Fourteenth Amendments by denying appellants due process and the equal protection of the law in the fundamental protected area of the right to vote and run for office.

**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

Constitution of the United States, First Amendment:

"Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Constitution of the United States, Fourteenth Amendment, due process and equal protection clauses:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the United States, Article I, §2, Clause 2:

"No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen."

California Elections Code §6830:

"Each candidate or group of candidates shall file a nomination paper which shall contain:

(a) The name and residence address of each candidate, including the name of the county in which he resides.

(b) A designation of the office for which the candidate or group seeks nomination.

(c) A statement that the candidate and each signer of his nomination paper did not vote at the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper. The statement required in this subdivision shall be omitted when no candidate was nominated for the office at the preceding primary election.

(d) A statement that the candidate is not, and was not at any time during the one year preceding the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper, registered as affiliated with a political party qualified under the provisions of Section 6430. The statement required by this subdivision shall be omitted when no primary election was held to nominate candidates for the office to which the independent nomination paper is directed."

California Elections Code §6831:

"Nomination papers shall be signed by voters of the area for which the candidate is to be nominated, not less in number than 5 percent nor more than 6 percent of the entire vote cast in the area at the preceding general election. Nomination papers for Representative in Congress, State

Senator or Assemblyman, to be voted for at a special election to fill a vacancy, shall be signed by voters in the district not less in number than 500 or 1 percent of the entire vote cast in the area at the preceding general election, whichever is less, nor more than 1,000."

California Elections Code §6833:

"Nomination papers required to be filed with the Secretary of State or with the county clerk shall be filed not more than 79 nor less than 54 days before the day of the election, but shall be prepared, circulated, signed, verified and left with the county clerk for examination, or for examination and filing, no earlier than 84 days before the election and no later than 5 p.m. 60 days before the election. If the total number of signatures submitted to a county clerk for an office entirely within that county does not equal the number of signatures needed to qualify the candidate, the county clerk shall declare the petition void and is not required to verify the signatures. If the district falls within two or more counties, the county clerk shall within two working days report in writing to the Secretary of State the total number of signatures filed. If the Secretary of State finds that the total number of signatures filed in the district or state is less than the minimum number required to qualify the candidate he shall within one working day notify in writing the counties involved that they need not verify the signatures."

California Elections Code §6864:

"Verification deputies appointed to obtain signatures to the nomination paper of any candidate

may, at any time not more than 84 nor less than 59 days prior to the election, obtain signatures to the nomination paper of the candidate."

California Elections Code §6430:

"A party is qualified to participate in any primary election:

(a) If at the last preceding gubernatorial election there was polled for any one of its candidates who was the candidate of that party only for any office voted on throughout the State, at least 2 percent of the entire vote of the State; or

(b) If at the last preceding gubernatorial election there was polled for any one of its candidates who, upon the date of that election, as shown by the affidavits of registration of voters in the county of his residence, was affiliated with that party and was the joint candidate of that party and any other party for any office voted on throughout the State, at least 6 percent of the entire vote of the State; or

(c) If on or before the 135th day before any primary election, it appears to the Secretary of State, as a result of examining and totaling the statement of voters and their political affiliations transmitted to him by the county clerks, that voters equal in number to at least 1 percent of the entire vote of the State at the last preceding gubernatorial election have declared their intention to affiliate with that party; or

(d) If on or before the 135th day before any primary election, there is filed with the Secretary of State a petition signed by voters, equal in number to at least 10 percent of the entire vote of the State at the last preceding gubernatorial

election, declaring that they represent a proposed party, the name of which shall be stated in the petition, which proposed party those voters desire to have participated in that primary election. This petition shall be circulated, signed, verified and the signatures of the voters on it shall be certified to and transmitted to the Secretary of State by the county clerks substantially as provided for initiative petitions. Each page of the petition shall bear a caption in 18-point black-face type, which caption shall be the name of the proposed party followed by the words 'Petition to participate in the primary election.' No voters or organization of voters shall assume a party name or designation which is so similar to the name of an existing party as to mislead voters. Whenever the registration of any party which qualified in the previous direct primary election falls below one-fifteenth of 1 percent of the total state registration, that party shall not be qualified to participate in the primary election but shall be deemed to have been abandoned by the voters, since the expense of printing ballots and holding a primary election would be an unjustifiable expense and burden to the State for so small a group. The Secretary of State shall immediately remove the name of the party from any list, notice, ballot, or other publication containing the names of the parties qualified to participate in the primary election."

California Elections Code §6082:

"Nomination papers for candidates for delegates of any party should be signed by not less than one-half of 1 percent and not more than 2 per-

cent of the vote constituting the basis of percentage."

STATEMENT OF THE CASE

Thomas Tone Storer was a candidate for the United States Congress in California's Sixth Congressional District. He was an independent who wished to appear on the November 7, 1972, general election ballot and be so designated.

Storer is an attorney at law who has been politically active in California's Marin County for a number of years. In November of 1964 he was elected to the Board of Supervisors of Marin County; he defeated an incumbent in a run-off election. In 1966 he won the Democratic nomination for United States Congressman in the First Congressional District (which then included Marin County) but was defeated by the incumbent Congressman at the general election. In 1968 Storer sought re-election to the Board of Supervisors and was narrowly defeated.

Storer, for most of his political life, has been affiliated with the Democratic Party. In the past few years, however, he has been distressed at the quality of political leadership in the United States and has concluded that the situation will not improve as long as the Democratic and Republican parties, which he feels are excessively controlled by money interests, dominate the country's political life to the exclusion of independent voices. Storer made his dissatisfaction

with the Democratic Party formal by changing his registration from "Democrat" to "Decline to State" (i.e., under California law, "Independent") in January of 1972.

Gus Hall and Jarvis Tyner are members of the Communist Party of the United States. They were candidates for the offices of President and Vice-President, respectively, of the United States in the November 7, 1972 election. They desired to run as independent candidates for those offices in the State of California and to be so designated on the election ballot. They collected and properly filed 25,000 nomination signatures, well in excess of the 18,000 required for recognized parties to place a candidate on the Presidential ballot in California.

All of the appellant-candidates were ready, willing, and able to tender the required filing fee and to meet any other reasonable requirements for positions on the ballot in California as independent candidates. Appellees refused to place their names on the ballot, relying on the following provisions of California law:

A. California Elections Code §§6833, 6864, 6830 and 6831 which, in combined effect, make it virtually impossible for any one to qualify as an independent candidate on a November election ballot:

- 1) §6831 prohibited appellants' names from appearing on the ballot unless they had acquired the signatures of not less than 5% nor more than 6% of the entire vote cast in the preceding general election.

2) §§6833 and 6864 gave appellants but 24 days in which to acquire those signatures. They were not permitted to circulate nomination petitions for voters' signatures before August 15, 1972, and would have had to acquire the requisite number of valid signatures by September 8, 1972.

3) California Elections Code §6830(c) provides that no person could validly sign appellant-candidates nomination papers who had voted in the primary election of June 6, 1972.

By contrast, a partisan candidate for Congress may appear on a primary ballot with no more than 40 signatures of sponsors and persons are not prohibited from signing his nominating papers by virtue of their participation in any elections. A partisan candidate for President or Vice President may appear on the primary ballot with no more than 18,000 signatures of sponsors and, likewise, they are not excluded by virtue of their participation in any elections.

B. California Elections Code §6830(d) prohibits any person who has been registered as affiliated with a political party at any time after June 6, 1971, from appearing on the ballot as an independent candidate. Storer had been registered as affiliated with the Democratic Party until January of 1972.

C. California Elections Code §6830(c) prohibits anyone who has voted "at the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper" from running as an independent candidate for Con-

gress. Storer voted in the primary election of June 6, 1972, in order to exercise his franchise on non-partisan matters; but because nominees for the office of United States Representative from the Sixth Congressional District were voted upon by partisan voters at that primary election, Storer's exercise of his right to the franchise resulted in his being unable to appear on the ballot as an independent Congressional candidate.

The three appellant-candidates in these suits are joined by registered voters who wished to sign nomination papers but were foreclosed, by California law, from doing so.

These appellants were foreclosed from signing nomination papers for an independent candidate because they had voted in the Democratic Primary of June 6, 1972. They were foreclosed from signing the nomination papers even though they signed no nomination papers for any other candidate for the respective offices in the primary election of June 6, 1972, or for the general election of November 7, 1972. Indeed, two of these appellants, Johnson and Soladay, while voting in the Democratic Party Primary, did not cast votes for either of the candidates for the Democratic nomination for Congressman of the Sixth Congressional District.

Storer and his co-appellants filed their suit on May 30, 1972, contending that the California scheme regulating the appearance of independent candidates on the ballot violated the following fundamental Constitutional rights:

- a) The right to seek and hold office;
- b) The right to equal protection of the laws;
- c) The right to due process of law;
- d) The right freely to express views and effectively participate in the political processes of the United States and California as guaranteed by the First Amendment to the United States Constitution.

And they contended, further, that California Elections Code §6830(d), by absolutely prohibiting Storer from appearing on the ballot because he had, within the past year, been affiliated with the Democratic Party, and California Elections Code §6830(c), by absolutely prohibiting Storer from appearing on the ballot as a candidate for United States Representative because he voted in the primary election of June 6, 1972, unconstitutionally added to the qualifications for Representative in the United States Congress in violation of Article 1, §2, Clause 2 of the United States Constitution.

In their prayer, appellants sought a declaration that the challenged sections of the California Elections Code are unconstitutional and an injunction providing that, upon Storer's tendering of the statutory filing fee and the presentation by him of a nomination petition signed by at least 40 electors qualified to vote in the Sixth Congressional District, defendants be required to certify Storer as a candidate for United States Representative in the Sixth Congressional District and defendants be required to place his name on the ballot.

On August 11, 1972, Hall and his co-plaintiffs filed suit attacking Elections Code §§6830(c), 6831, 6833, and 6864 on the same grounds as Storer, but as they applied to Presidential candidacies. Three-judge courts, identical in composition, were convened to hear both suits. The District Court heard argument in *Storer* on August 31, 1972, and at the Court's suggestion, counsel for *Hall* stipulated that their case would be submitted on the briefs and the *Storer* argument.

The judgment of the Court below, denying, on the merits, the relief prayed for by appellants was filed on September 8, 1972. See Appendix p. 84. The Notice of Appeal was filed on September 13, 1972.

On September 14, 1972, appellants applied to Mr. Justice Douglas for an injunction. The relief for which they prayed, pending disposition of this case on appeal, was the placing of their names on California's general election ballot of November 7, 1972. Oral argument before Mr. Justice Douglas was heard on September 15, 1972, in Gooseprairie, Washington. Mr. Justice Douglas denied appellants' Application for Injunctive Relief on that same date.

SUMMARY OF ARGUMENT

Appellants are candidates for federal office unaffiliated with political parties recognized in California who sought a place on the November 1972 general election ballot, supporters who desired to circulate

and sign their nominating petitions and voters who wished to cast their ballots for these candidates or some of them.

The candidates were denied a place on the California ballot by virtue of a confluence of California statutes designed to favor candidates of recognized political parties and make it virtually impossible for independents to appear on the ballot.

California justifies the challenged statutory scheme on the plea that it has a legitimate interest in maintaining a ballot of manageable size. All agree that the interest in a manageable ballot is legitimate but appellants maintain that this interest may not be pursued in an overbroad fashion and that California may demand as a price for appearing on the ballot only that the candidate demonstrate substantial support in the community. Furthermore, the measure of support must be politically neutral; it cannot heavily favor candidates affiliated with political parties over independents.

By that test, the California scheme is infirm. California's concern with a manageable ballot is only evident where independents are concerned. Although the candidate of a political party may appear on the ballot if his party received but 2% of the vote at the last general election and even though his party's share of registered voters had dropped to 1/15 of 1%, the independent must produce valid signatures of 5% of the voters in the last general election. Requiring independents actively to solicit and obtain the signatures of 5% of the electorate for ballot space while

permitting political parties to linger on with but 2% of the vote passively acquired in the last election hardly comports with the announced objective of limiting the ballot to those with substantial community support or with traditional notions of equal protection of the laws. Surely it cannot survive the "strict scrutiny" directed at statutes controlling the exercise of First Amendment rights.

Aside from the disparity between the demonstration of community support required of political party candidates on the one hand and independents on the other, California's statutory scheme broadly stifles the exercise of First Amendment rights when the legitimate end it is ostensibly promoting (limitation of the ballot to candidates with substantial community support) can be achieved without effectively disenfranchising independents. Although California could, if it did not so disproportionately favor candidates of political parties with little community support, require an independent to produce the signatures of 5% of the electorate, it cannot burden the 5% requirement with unrealistic barriers which unduly favor party-nominees. But that is what California does. The signatures of 5% of the electorate must be collected in a twenty-four day period coming at that time, in the late summer, when voters are most likely to be away on vacation. For good measure, no one may sign an independent candidate's nomination papers who voted, on a non-partisan or partisan ballot, at the primary election. This latter condition has two devastating effects: 1) it gives candidates affli-

ated with parties a prior, uncontested crack at the voters while requiring the independent candidate to persuade voters not to vote, even on significant ballot propositions, at the primary election; 2) it removes about 70% of the electorate from the pool of persons eligible to sign independent nominating petitions thus making the 5% requirement, in reality, a 25% requirement.

Obviously, California can adopt other means than these which would keep the ballot manageable and, at the same time, not suffocate the independent voice.

The above-described electoral scheme deprived all appellants of precious First Amendment liberties. Appellant Storer, and his supporters, suffered some additional, impermissible disabilities. Storer was absolutely prohibited from appearing on the ballot because he had cast a non-partisan ballot in the primary election and he was further and independently disqualified because he had been registered as a Democrat within the seventeen-month period preceding the general election. Why one should be disqualified from running as an independent because he voted a non-partisan ballot at the primary has never been explained by appellees. Appellees have explained the seventeen-month "purification period" for ballot status as an independent—but not very convincingly. It is said the requirement is a precaution against party-hopping and party-raiding. Oddly enough, one may actually party-hop and become a candidate on a partisan-primary ballot without enduring a seventeen-month waiting period. Seven months is all that is

required of the genuine party-hopper. But it is idle to talk of party-hopping and raiding without the essential ingredient—a party. Storer did not hop parties and he could not raid one for he was not a member of one. What appellees seem to be saying is that the state has an interest in requiring one to remain in a party as the price for ballot status. But the state has no interest in requiring membership in a political party as a condition for ballot status; indeed, the First Amendment forbids it. And so does Article I, §2, cl. 2 of the United States Constitution; requiring candidates to be members of political parties adds a qualification for the office not contained in the Constitution.

ARGUMENT

I.

CALIFORNIA ELECTION CODE §§6830(c), 6831 AND 6833, INDIVIDUALLY AND IN COMBINATION, MAKE IT VIRTUALLY IMPOSSIBLE FOR AN INDEPENDENT CANDIDATE TO APPEAR ON THE GENERAL ELECTION BALLOT; CONSEQUENTLY THEY VIOLATE THE FIRST AND FOURTEENTH AMENDMENTS

Those unaffiliated with a political party who seek a place on California's ballot are confronted with a staggering and suffocating set of restrictions. They must, in the late summer, in the period of 24 days, obtain valid signatures of 5 percent of the electorate, that 5 percent to be drawn exclusively from persons who did not vote in the spring primary election. Con-

sidered in its totality,¹ California's electoral scheme makes it virtually impossible for a candidate unaffiliated with an established, statutorily recognized political party to appear on the ballot. In sharp contrast, established political parties are nearly insured ballot space for their candidates. In order to maintain their place on the ballot they need have but one candidate for state-wide office poll 2 percent of the vote at the preceding gubernatorial election; to remain a viable and recognized political party their registered members need be no more than 1/15 of 1 percent of the state's entire registration.²

Under any theory of equal protection of the laws, this incredible disparity would be suspect. That suspicion matures to conviction when, as here, the statutory scheme in issue controls the political process and the right to vote, a "fundamental political right" that is "preservative of all rights." *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 999 (1972); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

In the present situation the state laws place burdens on two different, although overlapping kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank

¹*Jenness v. Fortson*, 403 U.S. 431 (1971); *Williams v. Rhodes*, 393 U.S. 23 (1968).

²Cal. Elec. Code §6430.

among our most precious freedoms. *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).³

Appellants represent a broad spectrum of persons engaged in the exercise of their fundamental political rights. Appellants include voters, persons attempting to participate in the nominating process and candidates for office. The voter-appellants, of course, seek to exercise the right of franchise in its most pristine form. Appellants attempting to influence the political process by participating in nominating a candidate for office are also engaged in the exercise of First Amendment rights.⁴ And the candidates, too, are

³See, also, *Reynolds v. Sims*, 372 U.S. 533, 555 (1964): "The right to vote freely for the candidates of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." And *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964): "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." Additionally see, generally, *Bullock v. Carter*, 405 U.S. 134 (1972); *Socialist Workers Party v. Rockefeller*, 314 F.Supp. 984 (S.D.N.Y.), aff'd 400 U.S. 806 (1970); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Evans v. Cornman*, 398 U.S. 419 (1970); *Cipriano v. City of Houma*, 395 U.S. 101 (1969); *Kramer v. Union Free School District No. 15*, 395 U.S. 621 (1969); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966); *Carlington v. Rash*, 380 U.S. 89 (1965); *Gray v. Sanders*, 372 U.S. 368 (1963); *Baker v. Carr*, 369 U.S. 186 (1962); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *United States v. Saylor*, 322 U.S. 385 (1944); *Smith v. Allwright*, 321 U.S. 649 (1944); *United States v. Classic*, 313 U.S. 299 (1941); *Lane v. Wilson*, 307 U.S. 268 (1939); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927); *United States v. Mosley*, 238 U.S. 383 (1915); *Guinn v. United States*, 238 U.S. 347 (1915); *Ex parte Yarbrough*, 110 U.S. 651 (1884); *Ex parte Siebold*, 100 U.S. 37 (1879).

⁴*Williams v. Rhodes*, *supra*; *Moore v. Ogilvie*, 394 U.S. 814, 818 (1969); *Briscoe v. Kusper*, 435 F.2d 1046, 1053 (7th Cir. 1970); *Puerto Rican Organization for Political Action v. Kusper*, 350 F.Supp. 606 (N.D. Ill. 1972); *Gonzales v. City of Sinton*, 319

seeking to exercise First Amendment rights, whether running for office be deemed a constitutional right in itself⁵ or a correlative and essential aspect of the right to vote.⁶

Because appellants are attempting to exercise fundamental constitutional rights, the state may not justify its discriminatory treatment of them on the simple and easy plea that some legitimate objective is rationally promoted by its statutory scheme. The

F.Supp. 189, 190 (S.D. Tex. 1970); *Communist Party v. Peek*, 20 Cal.2d 536, 543 (1942); *People ex rel. Hotchkiss v. Smith*, 206 N.Y. 231, 99 N.E. 568 (1912); *Hopper v. Britt*, 204 N.Y. 524, 98 N.E. 86, 88 (1912); cf. *Reynolds v. Sims*, *supra*, 377 U.S. at 565.

⁵*Draper v. Phelps*, 351 F.Supp. 677 (W.D. Okla. 1972); *Socialist Workers Party v. Martin*, 345 F.Supp. 1132 (S.D. Tex. 1972) (three-judge court); *Duncantell v. City of Houston, Texas*, 333 F.Supp. 973, 975 (S.D. Tex. 1971); *Thomas v. Mims*, 317 F.Supp. 179, 181 (S.D. Ala. 1970); *White v. Snear*, 313 F.Supp. 1100, 1103 (E.D. Pa. 1970); *Jenness v. Little*, 306 F.Supp. 925 (N.D. Ga. 1969), *appeal dismissed*, 397 U.S. 94 (1970); *Zeilenga v. Nelson*, 4 Cal.3d 716, 720-721 (1971); *Lasseigne v. Martin*, 202 So.2d 250 (Ct.App. La. 1967); *Fisher v. Taylor*, 210 Ark. 380, 196 S.W.2d 217, 220 (1946); *Holliday v. O'Leary*, 115 P. 204 (Mont. 1911); *Ragan v. Junkin*, 122 N.W. 473 (S.Ct. Neb. 1909); *Shields v. Tronto*, 395 P.2d 829 (Utah, 1964).

⁶See *Bullock v. Carter*, 405 U.S. 134, 142-143 (1972) ("the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates have at least some theoretical, correlative effect on voters"); *Hadnott v. Amos*, 394 U.S. 358, 366 (1969); *Allen v. State Board of Elections*, 393 U.S. 544, 570 (1969); *Green v. McKeon*, 468 F.2d 883 (6th Cir. 1972); *Graves v. Barnes*, 343 F.Supp. 704, 719-720 (W.D. Tex. 1972) (three-judge court); *Bolanowski v. Raich*, 330 F.Supp. 724, 729 (E.D. Mich. 1971); *Stapleton v. Clerk for City of Inkster*, 311 F. Supp. 1187, 1190 (E.D. Mich. 1970); and see *Turner v. Fouché*, 396 U.S. 346, 362-363 (1970):

[T]he appellants and the members of their class do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications. The state may not deny to some the privilege of holding public office that is extended to others on the basis of distinctions that violate federal constitutional guarantees." (Footnotes omitted).

special classification of independent candidates must be given close scrutiny; it may only be sustained if the appellants can demonstrate that there is a "compelling" interest served by the statutory scheme that overrides appellants' right to vote, organize effectively and run for office.⁷ Moreover, appellee cannot justify its burdens on the right of franchise as "compelling" unless it can demonstrate that it cannot promote its interest by a narrower, carefully drawn mechanism that would be less subversive of the right to vote. It has long been established that where a statute infringes upon fundamental rights "precision of regulation must be the touchstone."⁸

A statute lacking such precision is unnecessarily broad. In seeking to do A (a constitutionally per-

⁷*Bullock v. Carter*, 405 U.S. 134 (1972); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Oregon v. Mitchell*, 400 U.S. 112 (1970) (Brennan, White & Marshall, JJ., concurring and dissenting); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970); *Evans v. Cornman*, 398 U.S. 419 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969); *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Williams v. Rhodes*, *supra*. Cf. *Harper v. Virginia State Board of Education*, 383 U.S. 663 (1966). Accord *Yale v. Curvin*, 345 F.Supp. 447 (D.R.I. 1972) (three-judge court); *Manson v. Edwards*, 345 F.Supp. 719 (S.D. Mich. 1972); *People's Party v. Tucker*, 347 F.Supp. 1 (M.D. Pa. 1972) (three-judge court); *Ferguson v. Williams*, 343 F.Supp. 654, 656 (N.D. Miss. 1972) (three-judge court); *Nagler v. Stiles*, 343 F.Supp. 415 (D.N.J. 1972) (three-judge court); *Pontikes v. Kusper*, 345 F. Supp. 1104 (N.D. Ill. 1972) (three-judge court); *Socialist Workers Party v. Welch*, 334 F.Supp. 179 (S.D. Tex. 1971); *Socialist Workers Party v. Rockefeller*, 314 F.Supp. 984, 989 (S.D.N.Y.) (three-judge court), *aff'd*, 400 U.S. 806 (1970).

⁸*Dunn v. Blumstein*, *supra*, 92 S.Ct. at 1003, *United States v. Robel*, 389 U.S. 258, 265 (1967); *N.A.A.C.P. v. Button*, 371 U.S. 415, 438 (1963).

missible purpose) it also unnecessarily invades B ("area of protected freedom.")⁹

The essential notions are breadth and necessity. In *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) this Court put it thusly:

Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties *when the end can be more narrowly achieved*. (Emphasis added).¹⁰

The burden of demonstrating the absence of alternative means for advancement of a state purpose less restrictive of fundamental rights is on appellee. It is, in other words, "plainly incumbent upon the [state] to demonstrate that no alternative forms of regulation would combat such abuses [as may be constitutionally regulated] without infringing First Amendment rights." *Sherbert v. Verner*, 374 U.S. 398, 407 (1963). If the state fails the stringent alternatives test, that is the end of the matter; the challenged regulation must fall; the constitutional rights of appellants will not be balanced against the state's allegedly "com-

⁹See Amsterdam, Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U.Pa.L.Rev. 67, 75-76 (1960); *Zwickler v. Koota*, 389 U.S. 241, 249-250 (1967); *Aptheker v. Secretary of State*, 378 U.S. 500, 508-509 (1964); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

¹⁰"And if there are other, reasonable ways to achieve those [legitimate] goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Dunn v. Blumstein*, *supra*, 92 S.Ct. at 1003. Laws restricting the right of franchise must be "tailored so that the exclusion of appellant . . . is necessary to achieve the articulated goal." *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 632 (1969).

elling" interest. *United States v. Robel*, 389 U.S. 258, 268, fn. 20 (1967).

Measured against the standards of the "compelling interest" test and its corollary, the "alternative means" test, the impediments California imposes on the ballot-access of independents cannot pass constitutional muster. The only justification that could fairly be characterized as "compelling" which California has advanced for its independent nomination electoral mechanism is its concededly significant interest in keeping the size of the ballot manageable. But the interest in a short ballot cannot justify the state adopting any means it please to achieve the end.¹¹ If California's Democratically controlled legislature should pass a law excluding from the ballot candidates of any political party that did not equal Democratic registration it is hard to imagine a plea that this made for an uncluttered ballot being seriously entertained. An analogous situation obtains here. Unless it can be said that California can be legitimately interested in favoring candidates of political parties over independent candidates its "short ballot" justification for its independent nominating procedures must fail. And it cannot be said that California has a legitimate interest in favoring those

¹¹*Johnston v. Luna*, 338 F.Supp. 355 (N.D. Tex. 1972) (three-judge court); *Lasseigne v. Martin*, 202 So.2d 250 (Ct.App. La. 1967); cf. *Bullock v. Carter*, *supra*; *Williams v. Rhodes*, *supra*; *Jenness v. Miller*, 346 F.Supp. 160 (S.D. Fla. 1972). If "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit," *United States v. Robel*, *supra*, 389 U.S. at 263, the same must be true of the phrase "short ballot."

candidates affiliated with political parties.¹² The very notion of a state interest in favoring candidates of established political parties affronts the principle that "the Constitution visualizes no preferred class of voters. . . ." *Gray v. Sanders*, 372 U.S. 368, 380 (1963).

All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved to the virtue of political activity by minority, dissident groups, which enumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. . . . The absence of such voices would be a symptom of grave illness in our society. *Sweezy v. New Hampshire*, 354 U.S. 234, 250-251 (1957) (Opinion of Warren, C.J.).

The state, then, may not seriously contend that it has an interest in impeding independent access to the ballot for the purpose of promoting favored political parties. And since it may not do so, its contention that the present scheme is necessary in order to insure a manageable ballot is contradicted by its permissiveness when it comes to allowing established political parties to maintain a ballot position.¹³ A concern for manageable ballots which manifests itself only when those unaffiliated with a political party attempt to exercise their constitutional rights is not the sort of concern that has generally been denominated "compell-

¹²*Williams v. Rhodes*, *supra*; *Beck v. Hummel*, 150 Ohio St. 139, 140 (1948); *Moore v. Walsh*, 286 N.Y. 552, 37 N.E.2d 555 (1941); *In re Terry*, 203 N.Y. 293, 96 N.E. 931, 933 (1911).

¹³See, *supra*, p. 18; Cal.Elec. Code §6430.

ing." And, compelling or not, the interest in having a manageable ballot can be achieved without stifling the electoral power of non-partisan voices. There is simply no excuse for California's short-term period for circulating independent nominating petitions or its exclusion, from those who may sign the petitions, of a majority of the electorate.

Assuming, because of *Jenness v. Fortson*, 403 U.S. 431 (1971)¹⁴ that California, like Georgia, may constitutionally condition independent ballot access on the filing of nominating petitions signed by 5 percent of the registered voters,¹⁵ still there is no valid reason for the unrealistic time limit and the requirement that one, even if he is unaffiliated with a political party, forsake the right to vote in the primary if he is to participate, as a candidate or petition signer, in the independent nominating process.¹⁶ In *Jenness*, the Court observed that in Georgia any political organization was free to endorse any otherwise eligible person as its candidate, that a six month period was provided for the obtaining of the signatures of 5

¹⁴And see, *Jackson v. Ogilvie*, 325 F.Supp. 864 (N.D. Ill. 1971) (three-judge court), *aff'd mem.*, 403 U.S. 925 (1971).

¹⁵The assumption is arguendo. Since California allows a political party to remain on the ballot although it has obtained but 2 percent of the vote in the last election, it is in no position to insist that *Jenness* controls. In Georgia a political party cannot maintain ballot status unless it received at least 20 percent of the vote at the preceding gubernatorial or presidential election. California, unlike Georgia, requires the independent to demonstrate more support than the established political party.

¹⁶In California, independents, as well as those who are registered with a political party, may vote in the primary. Independents vote for non-partisan offices and on ballot propositions. See California Elections Code §§10290, 10291, 10298 and 10318.

percent of the eligible electorate, that a voter might sign a petition even though he signed the petition of another, that the signer was free to participate in the party primary and that, generally, "Georgia imposes no suffocating restrictions whatever upon the free circulation of nominating petitions." *Jenness v. Fortson*, *supra*, 403 U.S. at 438-39. None of that is true in California. California's Elections Code §6830(c) excludes from the group of potential signers those who have voted in the primary and thus makes available for the independent only about 30 percent of the electorate. By requiring appellants to obtain the signatures of 5 percent of this limited electorate, California has, in effect, placed on appellants a burden greater than a requirement that they produce the signatures of 20 percent of the registered voters in the district. And this immense number of signatures must be gleaned from a small portion of the general public, unidentifiable by any physical or geographical traits, which is composed of those persons least interested in the electoral process (those who did not even bother to vote in the primary election). For good measure, all this must be done in a period of twenty-four days during that time, in the latter part of August, when residents are most likely to be away on vacation and when persons solicited for signatures are most likely to be non-resident vacationers.

This immense burden, greater in magnitude than the 15 percent requirement struck down in *Williams v. Rhodes*, 392 U.S. 23 (1968), should be struck down on the authority of *Williams* alone. But it has some additional infirmities.

In the first place, California Elections Code §6830(c), by prohibiting those who have voted in the preceding primary election from signing nomination papers of an independent candidate, unconstitutionally conditions the exercise of a fundamental right on the relinquishment of another fundamental right. Co-appellants of the appellant-candidates are prohibited from signing the petitions of an independent candidate because, and solely because, they exercised their right to vote. They had no control over the names of candidates who appeared on their primary ballot, they signed no nominating petitions for candidates appearing in the primaries, and Storer's co-appellants, Johnson and Soladay, did not even vote in the primary for either of the choices presented to them. In order to sign the petition of Storer, a candidate who emphasized ecological issues, they would have had to surrender their right to vote in a primary where ecological issues appeared as ballot propositions.

The state may not condition the exercise of one constitutional right (in this case the right effectively to participate in the electoral process by signing the nomination papers of a candidate for office) on the abandonment of another constitutional right (in this case the right to vote in an election). See *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

Secondly, even if §6830(c) prohibited, in the customary fashion, voters who signed the *nominating papers* of a partisan candidate from signing those of

an independent candidate, it would still be constitutionally infirm because the statutory period for collecting signatures on partisan nominating papers *precedes* that of the period in which to acquire signatures on nominating papers of an independent candidate. Thus partisan candidates are given an unfair advantage, the opportunity to approach signators before independent candidates may even become formal candidates. The placing of such a special obstacle on independent candidates has been raised in two federal cases with which appellants are familiar. In both it was avoided by a statutory construction which left the independent candidate on essentially the same footing as partisan candidates. See *Moore v. Board of Elections for District of Columbia*, 319 F.Supp. 437 (D.D.C. 1970); *Jackson v. Ogilvie*, *supra*. §6830(c), however, cannot be saved by statutory construction. It places a special obstacle on the independent candidate by removing from his group of nomination supporters some 70 percent of the electorate before the period in which he may gather his signatures even begins.

Finally, the requirement that appellants obtain all these signatures from such a limited, unidentifiable and elusive group within a twenty-four day period is simply preposterous. What conceivable purpose can it serve? None but to hector the candidate and insure that the requirement will rarely, if ever, be satisfied. "The three-week requirement is suffocating and effectively blocks access to the ballot by all but the most disciplined of minority political organizations.

It freezes the status quo and reduces the voters' choice to a bare minimum." *People's Party v. Tucker*, 347 F.Supp. 1, 4 (M.D. Penna. 1972) (three-judge court).¹⁷

A manageable ballot size is decidedly a legitimate state concern. When properly and neutrally promoted that concern may fairly be called a compelling interest. Neutrality, though, is the lynchpin. A state may require that ballot positions be confined to those who have demonstrated some significant support among the electorate. But the measure of significant support cannot be weighted, as California weights it, in favor of those affiliated with political parties. It cannot require the independent to show community support at a level almost three times that required of a party, especially when the independent's support has to be generated by active community solicitation while the party's support is demonstrated by the simple marking of last election's ballots. And when the state requires the independent actively to solicit the electorate for support it may not unreasonably burden his solicitation with three-week time limits and arbitrary restrictions on which members of the electorate he is permitted to approach. Obviously there are less restrictive means for determining which candidates have significant community support. Just as obviously, those less restrictive means can be fashioned in a neutral manner which does not favor those affiliated

¹⁷In *People's Party* the court struck down a provision requiring political bodies wishing their candidates to appear on the ballot to secure the signatures of 2 percent of the largest vote cast in the state at the last election in a three-week period.

with a party without in any way advancing the ostensible goal of limiting ballot choices to those with significant support.

California Elections Code §§6830(c), 6831 and 6833, because they favor candidates affiliated with political parties more than is necessary to promote the interest of limiting the ballot to those with significant support and because they do not promote that interest by the least restrictive means, violate the First Amendment and the Fourteenth Amendment's due process and equal protection clauses.

II.

THE PROHIBITION OF APPELLANT STORER'S APPEARANCE ON THE BALLOT BECAUSE HE VOTED IN A NON-PARTISAN PRIMARY ELECTION AND BECAUSE HE HAD BEEN REGISTERED AS A DEMOCRAT DURING THE SEVENTEEN-MONTH PERIOD PRECEDING THE ELECTION APFRONTS THE FIRST AND FOURTEENTH AMENDMENTS

Appellant Storer and his co-appellant supporters suffered a special impediment in their attempts to secure a position for him on the November ballot as an independent candidate for Congress. Had every voter in the district signed a nominating petition for Storer he would, nevertheless, have been prohibited from appearing on the ballot for two reasons: (1) although unaffiliated with any political party at the time of the June primary election, Storer did cast a non-partisan ballot at that election¹⁸ and was, by virtue of California Elections Code §6830(c), thus

¹⁸See fn. 16, *supra*.

disqualified from appearing on the general election ballot as an independent; (2) although Storer abandoned his Democratic Party affiliation some ten months before the general election, California Elections Code §6830(d) required him to disaffiliate some seventeen months before the general election on pain of disqualification for ballot status as an independent nominee for Congress.

Neither §6830(c) nor §6830(d) serve any state interest other than the impermissible one of keeping independent nominees off the ballot. As to §6830(c) the point, we take it, is conceded. No one has ever been able to produce a legitimate reason for disqualifying an independent from the ballot because he, as an independent, voted a non-partisan primary ballot. §6830(c) is the very model of "simple-minded" electoral discrimination mentioned in *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

As to §6830(d) the point is not conceded. Appellees insist, and the Court below held, that requiring an independent to disaffiliate seventeen months before he seeks office somehow promotes a legitimate state concern in inhibiting "party hopping," although Storer did not hop parties, and "party raiding," although Storer joined no political party and was thus ill-positioned for a raid.

Putting aside, for the moment, the conceptually difficult notion that one raids a political party when he leaves it, we turn to the seventeen-month period.

A seventeen-month purification period is manifestly too long. Party-raiding can be forestalled by a wait-

ing period of much shorter duration. A valid waiting period must conform to the realities of party-raiding dangers or fall for overbreadth. It is "unreasonable and excessive," *Nagler v. Stiles*, 343 F.Supp. 415, 418 (D.N.J. 1972) (three-judge court), and "unduly restrictive." *Yale v. Curvin*, 345 F.Supp. 447, 451 (D.R.I. 1972).¹⁹

That seventeen months is too long a purification period is, curiously enough, recognized by California's election laws where actual party-hopping is involved. California Elections Code §6401 permits one to run for a party's nomination for Congress in the primary and appear on the ballot even though he has been a member of that party for less than seven months. Thus California favors real party-hoppers over independents by a period of ten months and justifies that irrational discrimination as a precaution against

¹⁹In both *Nagler* and *Yale* the courts assumed that the waiting period sustained by this Court in *Rosario v. Rockefeller*, — U.S. —, 41 L.W. 4401 (March 21, 1973), was, because shorter, reasonable and distinguishable. See also *Gordon v. Executive Committee of Democratic Party*, 335 F.Supp. 166, 169 (D.S.C. 1971):

Our system of government is based on the consent of the governed, and such consent is only illusory when voters are prevented by artificial restrictions for significant periods of time from changing political parties even though events or actions of elected representatives may have convinced the voter that a change in party allegiance is warranted. (P. 451-452).

But see *Lippit v. Cipollone*, 337 F.Supp. 1405 (N.D. Ohio 1971) (three-judge court), *aff'd*, — U.S. —, 92 S.Ct. 729 (1972). It should be emphasized that in *Lippit* the effect of Article I, §2 of the United States Constitution, discussed *infra*, III, p. 34, was neither raised nor considered. And in *Lippit*, of course, the statute actually dealt with a waiting period after *joining* a party, not after *leaving* a party to become an independent.

party-hopping. §6830(d), it turns out, is a no more "sophisticated" electoral discrimination than §6830(c).

Especially is that so when we realize that concern for party-hopping and raiding is misplaced unless focused upon people joining political parties. Without a party to be raided a party-raiding statute looks paltry and out-of-place. Storer did not hop among parties and, since he registered with none, fears that he might raid one were exaggerated.

The state cannot argue that there is any such thing as "independent" loyalty or that it has an interest in insisting that the disaffected, if they are to seek political office, must remain within the party which has engendered their disaffection.

It is one thing to maintain that the state has a legitimate interest in insuring that the nominees of a political party are loyal to that party's principles. It is quite another to maintain that the state has a legitimate interest in generally promoting political loyalty to partisan parties and has the power to withdraw political rights from those who would announce their independence of political parties. The state has as much business requiring us to belong to a political party as it would requiring us to attend church. If there is one thing that is unambiguously clear about the First Amendment it is that the state does not have the power to promote orthodoxies, be they political or otherwise. See *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

Far from being a "compelling interest" which overrides appellants' political rights, California's insis-

tence upon loyalty to some political party as the price for candidacy promotes no legitimate interest at all but seeks to do precisely what the First Amendment prohibits.

III.

CALIFORNIA ELECTIONS CODE SECTIONS 6830(c) AND 6830(d), WHICH DENY A PLACE ON THE BALLOT TO CANDIDATES WHO VOTED AT THE IMMEDIATELY PRECEDING PRIMARY OR WHO REGISTERED WITH A POLITICAL PARTY DURING THE YEAR PRECEDING THE IMMEDIATELY PRECEDING PRIMARY, VIOLATE ARTICLE I, SECTION 2, CLAUSE 2 OF THE UNITED STATES CONSTITUTION BY ADDING QUALIFICATIONS FOR THE OFFICE OF THE UNITED STATES CONGRESS

In its effort to foreclose independent candidates from a place on the ballot, California has added two special burdens on those who would seek election as a non-partisan. Elections Code §6830(c) requires:

[a] statement that the candidate and each signer of his nomination paper did not vote at the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper. The statement required in this subdivision shall be omitted when no candidate was nominated for the office at the preceding primary election.

Similarly, Elections Code §6830(d) requires:

[a] statement that the candidate is not, and was not at any time during the one year preceding the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper, registered as af-

filiated with a political party qualified under the provisions of Section 6430.²⁰ The statement re-

²⁰Elections Code §6430 sets forth the requirements for qualification as a recognized political party.

§6430. Qualified parties

A party is qualified to participate in any primary election:

(a) If at the last preceding gubernatorial election there was polled for any one of its candidates who was the candidate of that party only for any office voted on throughout the State, at least 2 percent of the entire vote of the State; or

(b) If at the last preceding gubernatorial election there was polled for any one of its candidates who, upon the date of that election, as shown by the affidavits of registration of voters in the county of his residence, was affiliated with that party and was the joint candidate of that party and any other party for any office voted on throughout the State, at least 6 percent of the entire vote of the State; or

(c) If on or before the 135th day before any primary election, it appears to the Secretary of State, as a result of examining and totaling the statement of voters and their political affiliations transmitted to him by the county clerks, that voters equal in number to at least 1 percent of the entire vote of the State at the last preceding gubernatorial election have declared their intention to affiliate with that party; or

(d) If on or before the 135th day before any primary election, there is filed with the Secretary of State a petition signed by voters, equal in number to at least 10 percent of the entire vote of the State at the last preceding gubernatorial election, declaring that they represent a proposed party, the name of which shall be stated in the petition, which proposed party those voters desire to have participate in that primary election. This petition shall be circulated, signed, verified and the signatures of the voters on it shall be certified to and transmitted to the Secretary of State by the county clerks substantially as provided for initiative petitions. Each page of the petition shall bear a caption in 18-point blackface type, which caption shall be the name of the proposed party followed by the words "Petition to participate in the primary election." No voters or organization of voters shall assume a party name or designation which is so similar to the name of an existing party as to mislead voters. Whenever the registration of any party which qualified in the previous direct primary election falls below one-fifteenth of 1 percent of the total state registration, that party shall not be qualified to participate in the primary election but shall be deemed to have been abandoned by the voters, since

quired by this subdivision shall be omitted when no primary election was held to nominate candidates for the office to which the independent nomination paper is directed.

Appellant Storer, for most of his political life, has been affiliated with the Democratic Party. In the past few years, however, he has been distressed at the quality of political leadership in the United States and has concluded that the situation will not improve as long as the Democratic and Republican parties, which he feels are excessively controlled by money interests, dominate the country's political life to the exclusion of independent voices. Storer made his disaffection with the Democratic Party formal by changing his registration from "Democrat" to "Declined to State" (i.e., under California law, "Independent") in January of 1972. Under the terms of §6830(d) he was therefore ineligible for a place on the ballot as an independent candidate in November, 1972, because he has been registered with the Democratic Party at some time after June 6, 1971 (the one year preceding the June 6, 1972 California primary, the primary next preceding the general election for which Storer sought a place on the ballot).²¹

the expense of printing ballots and holding a primary election would be an unjustifiable expense and burden to the State for so small a group. The Secretary of State shall immediately remove the name of the party from any list, notice, ballot, or other publication containing the names of the parties qualified to participate in the primary election.

²¹When Storer filed his petition for a place on the ballot, he was informed by Peter Meyer, Marin County Elections Clerk, that he could not be listed because he had been a member of a party within the past two years. Affidavit of Thomas Tone Storer. Appendix page 27.

He was further disqualified by virtue of §6830(c) because he voted at the June 6, 1972 primary election.²² Thus, even if he had been able to meet the onerous requirements of Elections Code §§6833, 6864 and 6831 he would still have been denied a place on the ballot.

The requirement that Storer give up his right to the franchise and that he not have been registered with a political party constitute additional qualifications for the office of Member of Congress in violation of Article I, §2, cl. 2 of the United States Constitution, which sets forth the exclusive qualifications for Members of Congress.²³

²²Storer did not vote for a candidate for Congress, but he did vote for local offices and for and against questions presented to the voters on the primary ballot. Complaint, Para. X(b), Appendix, p. 11.

²³"No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." Article II, §5 of the United States Constitution sets forth qualifications for the office of President similar to those set forth by Article I, §2, cl. 2 for the office of Member of Congress:

No person except a natural-born citizen or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible for the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

Appellant Hall, however, while a candidate for the office of President, had neither registered with a recognized political party in the State of California nor voted at the next preceding primary election. Therefore, although Elections Code §§6830(c) and 6830(d) prescribed additional qualifications for the office of President as well as for Member of Congress, those qualifications did not personally operate to bar appellant Hall.

- A. The Qualifications of Age, Citizenship and Residency set forth in Article I, Section 2, clause 2 of the United States Constitution constitute the sole and exclusive Qualifications which may be set for Members of Congress.

Article I, §2, cl. 2 provides:

Qualification of Members.

No person shall be a Representative who shall not have attained to the Age of 25 Years, and been 7 Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Until *Powell v. McCormack*, 395 U.S. 486 (1969), this Court had never decided whether the qualifications set forth in Article I, §2, cl. 2 were minimal qualifications to which the states and Congress itself could add others or a complete statement of the qualifications to which the states or Congress could add no more. This Court resolved the question in *Powell*, however, in an opinion in which Chief Justice Warren concluded for eight members of the court that "the House is without power to exclude any member-elect who meets the Constitution's requirements for membership." 395 U.S. at 546.

In *Powell*, Congressman Adam Clayton Powell, a Congressman for many years, had been re-elected in 1966, but denied his House seat because of allegedly unwarranted assertions of privilege and immunity from the processes of New York courts and of allegedly wrongful diversion of House funds and the alleged filing of false reports concerning spending of foreign currency. The House of Representatives recognized that Powell met the Article I, §2, cl. 2

qualifications of age, citizenship and residency, but excluded him from the seat, invoking its right under Article I, Section 5, clause 1 to judge the qualifications of its members.²⁴ This Court held, however, that the power of the House to judge the qualifications of its members extends only to a determination as to whether the challenged member met the Article I, §2, cl. 2 age, citizenship and residency requirements. 395 U.S. at 550. The result was founded upon an analysis of the pre-convention experience in England, of the convention debates preceding and during the ratification of the Constitution, and on Congress' own understanding of its power in post-ratification times.

1. The decision of the Constitutional Convention to set exclusive Qualifications for Members of Congress was dictated in part by legislative abuses in Britain and a desire to prevent legislatures from controlling the qualifications of elected representatives.

The powerful conviction of the Founders that "the qualifications of elected representatives of the people were fundamental articles in a Republican Government and ought to be fixed by the Constitution,"

²⁴Article I, §5, cl. 1:

Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide.

The House also argued that regardless of its power to determine qualifications, it was empowered to expel a member under Article I, Section 5, clause 2. ("Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of 2/3 expel a member.") The Court rejected that argument, holding that "exclusion and expulsion are not fungible proceedings." 395 U.S. at 512.

[remarks of Mr. Madison, 2 Farrand, *Records of the Federal Convention* 249] reflected a determination on their part to guarantee that contemporaneous activities of the British Parliament "subversive of the rights of" the British people never be tolerated in this country. Thus Mr. Madison "observed that the British Parliament possessed the power of regulating the qualifications both of the electors, and the elected; and the abuse they had made of it was a lesson worthy of our attention. They had made the changes in both cases subservient to their own views, or to the views of political or religious parties" Farrand, Vol. 2, p. 250.

Madison warned that permitting a Legislature to control in any way the qualifications of elected representatives of the people was a path by which "a Republic may be converted into an aristocracy or oligarchy," Farrand, Vol. 2, p. 249, much as the will of the British electorate was threatened by Parliament's arbitrary exclusion of unpopular members such as John Wilkes. Chief Justice Warren succinctly summarized the Wilkes case and its impact on the Framers in *Powell, supra*:

By 1782, after a long struggle, the arbitrary exercise of the power to exclude was unequivocally repudiated by a House of Commons resolution which ended the most notorious English election dispute of the 18th century—the John Wilkes case. While serving as a member of Parliament in 1763, Wilkes published an attack on a recent peace treaty with France, calling it a product of bribery and condemning the

Crown's ministers as "the tools of despotism and corruption." R. Postgate, *That Devil Wilkes* 53 (1929). Wilkes and others who were involved with the publication in which the attack appeared were arrested. Prior to Wilkes' trial, the House of Commons expelled him for publishing "a false, scandalous, and seditious libel." 15 *Parl.Hist.Eng.* 1393 (1764). Wilkes then fled to France and was subsequently sentenced to exile. 9 L. Gipson, *The British Empire Before the American Revolution* 37 (1956).

Wilkes returned to England in 1768, the same year in which the Parliament from which he had been expelled was dissolved. He was elected to the next Parliament, and he then surrendered himself to the Court of King's Bench. Wilkes was convicted of seditious libel and sentenced to 22 months' imprisonment. The new Parliament declared him ineligible for membership and ordered that he be "expelled this House." 16 *Parl. Hist.Eng.* 545 (1769). Although Wilkes was re-elected to fill the vacant seat three times, each time the same Parliament declared him ineligible and refused to seat him. See 11 Gipson, *supra*, at 207-215.

Wilkes was released from prison in 1770 and was again elected to Parliament in 1774. For the next several years, he unsuccessfully campaigned to have the resolutions expelling him and declaring him incapable of re-election expunged from the record. Finally, in 1782, the House of Commons voted to expunge them, resolving that the prior House actions were "subversive of the rights of the whole body of electors of this kingdom." 22 *Parl.Hist.Eng.* 1411 (1782).

With the successful resolution of Wilkes' long and bitter struggle for the right of the British electorate to be represented by men of their own choice, it is evident that, on the eve of the Constitutional Convention, English precedent stood for the proposition that "the law of the land had regulated the qualifications of members to serve in parliament" and those qualifications were "not occasional but fixed." 16 Parl.Hist.Eng. 589, 590 (1769). Certainly English practice did not support, nor had it ever supported, respondents' assertion that the power to judge qualifications was generally understood to encompass the right to exclude members-elect for general misconduct not within standing qualifications. With the repudiation in 1782 of the only two precedents for excluding a member-elect who had been previously expelled it appears that the House of Commons also repudiated any "control over the eligibility of candidates, except in the administration of the laws which define their [standing] qualifications." T. May's Parliamentary Practice 66 (13th ed. T. Webster 1924). See Taswell-Langmead, *supra*, at 585. . . .

Wilkes' struggle and his ultimate victory had a significant impact in the American colonies. His advocacy of libertarian causes and his pursuit of the right to be seated in Parliament became a *cause celebre* for the colonists. "[T]he cry of 'Wilkes and Liberty' echoed loudly across the Atlantic Ocean as wide publicity was given to every step of Wilkes's public career in the colonial press * * * They named towns, counties, and even children in his honour." 11 Gipson, *supra*, at 222. It is within this historical context that we must examine the Convention debates in

1787, just five years after Wilkes' final victory.
395 U.S. at 527-531 (Footnotes omitted.)²⁵

Although Wilkes' case, like that of Congressman Powell, grew out of the attempt of the national legislature to seize from the electorate control over the parliamentary body's membership, the teaching of that case is not limited to its impact on the interaction between qualification for office and the will of the *national* legislature. As the convention debates reveal, the Wilkes case had shown the Framers the importance of a set of qualifications for office which no legislature could alter to suit its own purposes.

2. It was the firm intention of the Framers that neither the separate states nor the national legislature itself was to have the power to alter, add to, vary or ignore the constitutional qualifications for membership in either House.

The history of the proceedings at the Constitutional Convention of 1787 during which the age, citizenship and inhabitancy qualifications for membership in the House²⁶ were debated and accepted, and all other qualifications whatsoever were rejected, reveals the unmistakable intention of the Framers that neither the national Legislature nor the state legislatures were to have any power to alter, add to, vary or ignore the

²⁵For a more complete history of the Wilkes case and contemporaneous parliamentary problems, see *Powell, Briefs of Counsel, supra* at 34-46; Postgate, *That Devil Wilkes* (New York 1929), pp. 11, 51-53, 82; *Watkins v. United States*, 354 U.S. 178, 190, 191 (1957).

²⁶Article I, §2, cl. 2 reads:

"No person shall be a representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."

constitutional qualifications. Accordingly the power of each House to be the "judge of the . . . qualifications of its own members",²⁷ and the power of the state legislatures to set the "times, places and manner of holding elections for Senators and Representatives,"²⁸ was in the intention of the Framers, restricted solely to those qualifications set forth in the Constitution itself.²⁹

After agreeing upon the age, citizenship and inhabitancy qualifications, 2 Farrand, *Records of the Federal Convention*, p. 248, et seq., the Convention turned to a proposal of Gouverneur Morris which would "leave the Legislature entirely at large" to set qualifications for membership in each House. 2, Farrand, p. 250.³⁰ The effect of this proposal, Professor

²⁷Article I, §5, reads in pertinent part:

"Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . ."

²⁸"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

²⁹Counsel acknowledge reliance on, and direct the Court's attention to, the extensive historical research in this area presented by counsel for the petitioner in *Powell v. McCormack*, 395 U.S. 496 (1969), see, United States Supreme Court Records, Briefs of Counsel, Volume 6251, Petitioners Opening Brief at 1-97.

³⁰Gouverneur Morris' proposal arose out of a discussion which had great significance to the members of the Convention. After voting upon the age and residence qualifications the Convention was confronted with a proposal that an additional qualification of landed property be affixed to members of the Legislature. On June 26th, George Mason had suggested "the propriety of annexing to the office of Senator a qualification of property" Elliot's Debates, Vol. 5, p. 247. On July 26th, Mason further moved that "the Committee of Detail be instructed to receive a clause requiring certain qualifications of landed property . . . in members of the legislature . . ." Farrand, Vol. 2, p. 121. John Dickinson, of Delaware, strongly

Charles Warren points out, "if adopted, would have been to allow Congress to establish any qualifications which it deemed expedient." Warren, *The Making of the Constitution*, 420.

In the ensuing debate, Mr. Williamson, of North Carolina, and Mr. Madison, of Virginia, strongly opposed such a proposal. Mr. Williamson argued:

This could surely never be admitted. Should a majority of the Legislature be composed of any particular description of men, of lawyers for example, which is no improbable supposition, the future elections might be secured to their own body. 2 Farrand, *Records of the Federal Convention*, p. 250.

Mr. Madison warned that to permit the Congress to establish such qualifications as it deemed expedient would be "improper and dangerous". Madison's own summary of his position at the Convention is compelling:

opposed such a clause stating that he "doubted the policy of interweaving into a Republican Constitution a veneration of wealth . . ." Farrand, Vol. 2, p. 123. On August 6, the Committee of Detail reported a provision that "The Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient." Farrand, Vol. 2, p. 179. At this point Charles Pinckney moved that the President and Judges also be required to possess "competent property to make them independent." Farrand, Vol. 2, p. 248. Benjamin Franklin strongly opposed his proposal stating that he "expressed his dislike of everything that tended to debase the spirit of the common people." Farrand, Vol. 2, p. 249. Pinckney's motion was "rejected by so general a no that the States were not called". Farrand, Vol. 2, p. 249. At this point Morris moved to give Congress unlimited power to fix qualifications. Farrand, Vol. 2, p. 250. This motion was defeated and following this the Convention rejected the clause as reported by the Committee. Farrand, Vol. 2, p. 251. For a more extensive discussion of the debates and parliamentary moves see Warren, *The Making of the Constitution*, pp. 412 to 426.

Mr. (Madison) was opposed to the Section as vesting an improper & dangerous power in the Legislature. The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. *A Republic may be converted into an aristocracy or oligarchy as well by limiting the number capable of being elected, as the number authorized to elect. . . .* Qualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partisans of [a weaker] faction.

As Professor Charles Warren points out in his study of the Constitutional Convention, *The Making of our Constitution* (1928),

[T]he Convention evidently concurred in these views, for it defeated the proposal to give to Congress power to establish qualifications in general by a vote of seven states to four. Warren, p. 421, Farrand, Vol. 2, p. 250.

At the same time the Convention also defeated the proposal for a property qualification. Farrand, Vol. 2, p. 250.

And on this same day, August 10, the Convention, without debate or dissent, agreed to that section of the report which provided that: "Each House shall be the judge of the elections, returns and qualifications of its own members." Farrand, Vol. 2, p. 254.

Professor Warren notes, "the meaning of this provision (which became Article I, Section 5 of the Constitution, as finally drafted) is clearly shown if taken

in connection with the legislative actions and debates of August 10th which surrounded its enactment."

Warren, *supra*, at p. 420. Warren continued:

Such action would seem to make it clear that the Convention did not intend to grant to a single branch of Congress, either to the House or to the Senate, the right to establish any qualifications for its members, other than those qualifications established by the Constitution itself, viz., age, citizenship and residence. For certainly it did not intend that a single branch of Congress should possess a power which the Convention had expressly refused to vest in the whole Congress. As the Constitution, as then drafted, expressly set forth the qualifications of age, citizenship, and residence, and as the Convention refused to grant to Congress power to establish qualifications in general, the maxim *expressio unius exclusio alterius* would seem to apply. . . . *The elimination of all power in Congress to fix qualifications clearly left the provisions of the Constitution itself as the sole source of qualifications.* Warren, *supra*, at p. 421. (Emphasis added.)

The oft-expressed fears of the Framers that the legislature might seize control of the voters' right to choose elected officials applied equally to state and national legislatures. Surely the Framers did not intend that the state legislatures would have power superior to the national legislature where qualifications for the national legislature were concerned. The debates before state conventions on the ratification of the Constitution demonstrate beyond a doubt that it was the intent of the Framers not only that the Congress be

prohibited from adding to the qualifications set forth in Article I, §2, cl. 2, *Powell v. McCormack*, 395 U.S. 486 (1969), but that the state legislatures be similarly confined.

3. The debates at the state conventions "demonstrate the Framers' understanding that the qualifications for members of Congress had been fixed in the Constitution," *Powell v. McCormack*, 395 U.S. 486, 540 (1969) and that neither Congress nor the state may alter those qualifications.

Alexander Hamilton spoke simply to the New York convention of the duty of legislatures to honor the choice of the people:

After all Sir, we must submit to the idea, that the true principle of a republic is, that the people should choose whom they please to govern them. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed. 2 Debates on the Federal Constitution 257 (J. Elliot, ed. 1876).

Robert Livingston told the same convention of the danger of permitting any legislature to come between the people and their individual elected representatives:

The People are the best judges who ought to represent them. To dictate and control them, to tell them whom they shall not elect, is to abridge their natural rights. Elliot's Debates, *supra* at pp. 292-293.

Arguing before the Virginia convention for ratification, Wilson Carey Nicholas relied upon Article I, §2, cl. 2 to meet the arguments of Patrick Henry and

his supporters that the Constitution subverted popular democracy.

Secondly, as it respects the qualifications of the elected. It has ever been considered a great security to liberty, that very few should be excluded from the right of being chosen to the Legislature. *This Constitution has amply attended to this idea. We find no qualifications required except those of age and residence which create a certainty of their judgment being matured, and of being attached to their state.* Elliot's Debates, *supra*, Vol. III, at p. 8 (Emphasis added).

The examples stated above go to the very heart of the Constitution and the fears of the Framers that the legislature would, to use a phrase unknown at the time, become a Frankenstein, rising up to destroy and disenfranchise those who had created it. The power of the people to choose their representatives, so long as they met the minimal qualifications of Article I, §2, cl. 2, lay at the very heart of the Constitution. See *Newberry v. United States*, 256 U.S. 243, 256 (1921); Story, *Commentaries on the Constitution*, §§814 et seq.

This original understanding that the legislature would not abridge the natural right of the people to select their own representatives is fundamental to the Constitutional imperative of "a government of laws and not of men," *Marbury v. Madison*, 1 Cranch 137, 162 (1803) and applies to the state legislatures as well as to the power of Congress to judge its own members. As has been seen, a major difficulty of ratification centered around the need for direct popular democracy and a fear that that popular democracy would already

be in danger with Senators elected by state legislatures. The debate over Article I, §2, cl. 2, clearly reflected its place as a major safeguard against both national and state legislatures. See Elliot's Debates, *supra*, at pp. 292-293, and Vol. III at p. 8.

As Mr. Justice Reynolds³¹ wrote for the Court in *United States v. Newberry*, *supra*:

Section Four [Article I, Section 4, giving the Congress final control over the times, places and manner of House elections³²] was bitterly attacked in the State Conventions of 1787-1789, because of its alleged possible use to create preferred classes and finally to destroy the States. *In defense, the danger incident to absolute control of elections by the States and the express limitations upon the power, were dwelt upon.* Mr. Hamilton asserted: "The truth is that there is no method of securing to the rich the preference apprehended but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred upon the National Government. Its authority would be expressly restricted to the regulation of the *times* the *places*, and the *manner* of elections. The qualifications of the persons who may choose, or be chosen, as has been remarked

³¹Justice Reynolds was joined by Mr. Justice Holmes, Mr. Justice McKenna and Mr. Justice Day.

³²And over the times and manner of Senate elections: "The Times, places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators." Article I, §4 now governs times, places and manner of elections for both Houses. Seventeenth Amendment; *Gray v. Sanders*, 372 U.S. 368, 380-381 (1963).

upon other occasions are defined and fixed in the Constitution and are unalterable by the Legislature." The Federalist, LIX, LI. . . . See, Story on the Const. §§814, 35 seq. 256 U.S. at p. 255-256. (Emphasis added.)

The concurring opinion in *Newberry* quotes with approval Hamilton's comments in Number 60 of the Federalist Papers which sets forth the policy reasons for a strict interpretation of Article I, §4, cl. 1, policy reasons which apply with equal force to the case now before the Court:

What was said, in No. 60 of the Federalist, about the authority of the National Government being *restricted* to the regulation of the time, the places, and the manner of elections, was in answer to a criticism that the national power over the subject 'might be employed in such a manner as to promote the election of some favorite class of men in exclusion of others,' as by discriminating 'between the different departments of industry, or between the different kinds of property, or between the different degrees of property'; or by a leaning 'in favor of the landed interest, or the monied interest, or the mercantile interest, or the manufacturing interest;' and it was to support this contention that there was 'no method of securing to the rich the preference apprehended but by prescribing qualifications of property either for those who may elect, or be elected,' which formed no part of the power to be conferred upon the national government, that Hamilton proceeded to say that its authority would be 'expressly restricted to the regulations of the *times*, the *places*, and the *manner* of elections.'

This authority would be as much restricted, in the sense there intended if 'the manner of elections' were construed to include all the processes of election from first to last. *The restrictions arose from the express qualifications prescribed for members of House and Senate, and for those who were to choose them; subject to which all regulations of preliminary, as well as of final, steps in the election necessarily would have to proceed.* 256 U.S. at 283-284. (Justices Pitney, Brandeis and Clark dissenting in part.) (Emphasis in last sentence added.)

In *United States v. Classic*, 313 U.S. 299 (1940) This Court again spoke to the purpose of Article I, §2. Although *Classic* overruled the holding in *Newberry* that primaries were not a part of the electoral process to be regulated by Congress under Section 4, both the *Classic* and *Newberry* courts agreed with the fundamental importance of Article I, §2, as a safeguard of the right of the people to choose their representatives, subject only to constitutional qualifications.

[A] dominant purpose of Section 2, so far as the selection of representatives in Congress is concerned, was to secure to the people the right to choose representatives . . . to safeguard the right of choice by the people of representatives in Congress secured by Section 2 of Article I," 313 U.S. at 318, 320 (opinion of Mr. Justice Stone).

See, Stassen for President Citizen Committee v. Jordan, 377 U.S. 914, 927 (1964) (opinion of Justice Douglas dissenting; with Chief Justice Warren and

Justice Goldberg from a denial of certiorari); *Bond v. Floyd*, 385 U.S. 116 (1967).

4. The Action of Congress in the Post-Ratification period Indicated that Body's Understanding that Article I, Section 2, clause 2 Prescribed the Sole Qualifications for Congressional Office.

In the case of *William McCreery*, Tenth Congress, 1807, 1 Hinds §414, the House affirmed the exclusivity of Article I, §2, cl. 2. In seating a Congressman who met the cl. 2 requirements, but did not meet an additional state requirement, the House took up the very issue before the Court in this case and acknowledged fundamental Constitutional principles:

1. The people had delegated no authority to the States or to the Congress to add to or diminish the qualifications prescribed by the Constitution. 1 Hinds at p. 382. See in particular *Annals of Congress* for the 10th Congress, pp. 872, 875, 887-88, 893, 895, 909, 910, 915-16.
2. If they could do this [deviate from strict constitutional qualifications] any sort of dangerous qualifications might be established—of property, color, creed, or political professions. 1 Hinds at p. 382; *Annals of Congress* for the 10th Congress, pp. 873, 878, 895, 980-09, 913.
3. The people had a natural right to make a choice of their Representatives, and that right should be limited only by a convention of the people, not by a legislature. 1 Hinds at p. 382, *Annals of Congress* for the 10th Congress, pp. 872-74, 875, 895.

Accordingly, the House voted to seat the Congressman-elect after finding that he possessed the consti-

tutional qualifications, holding that those qualifications are exclusive and the sole requirements for taking the seat. *Annals of Congress for the 10th Congress*, pp. 878, 910, 911-12, 914, 918.

These principles, responsive to the constitutional mandate established only twenty years previously, reflected an understanding on the part of the members of the House in the first days of the Republic that what is here involved is the most fundamental principle of a democratic society—the right of the people freely to elect their own representatives. Thus Representative Desha expressed the deep-felt sentiments of the House underlying its actions in the precedent-making decision when he said:

On this occasion, the question was whether . . . any State Legislature, or any other power of legislation, could add qualifications to any member of that House . . . every contraction of qualifications for Representatives was an abridgement of the liberty of the citizens. The power of adding other qualifications than those fixed by the Constitution would . . . be a breach of the right of suffrage. . . . We are placed here as guardians of the people's rights and privileges. Do not then let us hold out with one hand a fair appearance of zeal for the rights of the people and the public good, and at the same time take every advantage imaginable with the other, by curtailing their Constitutional privileges, and, instead of allowing the people a complete range to select a man worthy of representing them in Congress, confine them to certain situations. I dislike this kind of political hypocrisy. I dislike anything that looks like sporting with the rights of the

people, with the rights of those that I consider the firm supporters of the republican fabric. Annals of Congress for the 10th Congress.

This case in the House, arising in the earliest days of the Republic, has of course great importance, for, as Chief Justice Taft said in *Myers v. United States*, 272 U.S. 52, 175 (1926), "This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given its provisions." See also, the cases of *Turney v. Marshall* and *Fouke v. Trumbull*, 34th Congress, 1856, 1 Hinds, p. 384. ("It is a fair presumption that when the Constitution prescribes these qualifications as necessary to a Representative in Congress it was meant to exclude all others." 1 Hinds, at p. 385; "By the Constitution, the people have a right to choose as Representative any person having only the qualifications therein mentioned, without superadding thereto any qualifications whatever." 1 Hinds at 386); *Case of Benjamin Star*, 37th Congress (1862), 1 Hinds, §433; *Francis v. Shoemaker*, 73rd Congress, 77 Cong. Rec. 131, 132, 133, 134, 136, 139 (1933).

In *Grafton v. Conner*, 41st Congress (1870), Cong. Globe, Part 3, 41st Cong., 2d Sess. 1869-70, pp. 2322-23, Representative Oath succinctly stated the issue:

Turn to the Constitution and see what is prescribed in reference to the qualifications of a

member of this House. Mr. Conner has the requisite age. He has the requisite residence. He has the requisite certificate of his election from the proper authorities. The Committee of Elections has so reported, and that settles the *prima facie* case.

So too does Thomas Tone Storer have the requisite age. He has the requisite residence and citizenship. He lacks only the certificate of election and he may lack that because the State of California unconstitutionally abridged his right to win that certificate.

5. State and lower federal Court Decisions interpreting the power of states to add to the qualifications for Congress have almost uniformly determined that the states may not add such qualifications; none has permitted qualifications such as those required by California.

Although this Court has not had occasion to address the apparent tension between Article I, §2, cl. 2 and Article I, §4, cl. 1,³³ the state and lower courts have uniformly held that a state legislature may no more add to Congressional qualifications than the national legislature could. In fact, of course, there is far less reason to permit states to alter qualifications for federal office, since to do so would alter the balance between federal and state governments so carefully worked out by the Framers. The highest state courts

³³The argument was made in *MacDougall v. Green*, 335 U.S. 281 (1948) that signature-gathering requirements including provisions which required candidates for state-wide office to secure signatures in each county constituted added qualifications for the office of Senator. The *MacDougall* Court did not reach the merits, but in a *per curiam* decision held the issues to be non-justiciable. 33 U.S. at 284. *MacDougall* was over-ruled *sub silentio* in *Baker v. Carr*, 369 U.S. 186 (1962) and *Williams v. Rhodes*, 393 U.S. 23 (1968).

have indeed themselves been sensitive to the problems of federalism which arise when states involve themselves in the qualifications of national officers.

In *In re O'Connor*, 17 N.Y.S. 2d 758 (1940) the New York Supreme Court refused to reject the independent nominating petition of Earl Browder, then President of the Communist Party of the United States as a candidate for Representative in Congress. Opponents sought to enjoin the placement of his name on the ballot on the grounds that he was ineligible "by reason of his open espousal of international Communism and his avowed standing as a leader of the Communist Party in America." 17 N.Y.S. 2d at 759. The Court succinctly stated the principles governing that case, principles entirely apposite here:

Under our fundamental law, the Constitution of the United States, there are but three qualifications for membership in the lower house of Congress: (a) one must be at least twenty-five years of age; (b) he must have been a citizen for at least seven years; and (c) he must be an inhabitant in the state in which he is chosen (U.S.C.A. Const. Article I, Section 2, clause 2). It has been frequently held by the courts and by the Congress itself, in contested election cases, that the mere possession of these enumerated qualifications entitles one to election to the office of Representative. As Judge Story stated in his "Commentaries on the Constitution" (section 625): "It would seem but fair reasoning upon the plaintiffs principles of interpretation, that when the Constitution established certain quali-

fications as necessary for office, it meant to exclude all others as prerequisites"—and as Cooley stated it in his "General Principles of Constitutional Law" (3d Ed., pp. 285, 290): "*The Constitution and laws of the United States determined what shall be the qualifications for federal office, and state constitutions and laws can neither add to nor take away from them.*" 17 New York S.2d at 759 (Emphasis added.)

And in *Hellmann v. Collier*, 141 A.2d 908, 217 Md. 93 (1958) the Maryland Court of Appeals struck down Article III, Section 158(c) of the Maryland Code which required that every candidate for election to the House of Representatives be a resident of the district in which he seeks election. The Court in *Hellmann* looked to how Congress had handled an earlier case in which two Illinois state judges had been elected to the House of Representatives despite a state law which prohibited state judges from being elected to any office in the federal government. Judges Marshall and Trumbull, asked the House to seat them and invalidate the Illinois constitutional restriction. The *Hellmann* Court cited with approval the decision of the House committee:

The qualifications of a Representative, under the Constitution, are that he shall obtain the age of 25 years, shall have been 7 years a citizen of the United States, and, when elected, an inhabitant of the state in which he shall be chosen. It is a fair presumption that, when the Constitution prescribes these qualifications as necessary to a Representative in Congress, it was meant to exclude all others. And to your committee it is equally

clear that a State of the Union has not the power to superadd qualifications to those prescribed by the Constitution for Representatives, to take away from "the people of the several States" the right given them by the Constitution to choose, "every second year," as their Representative in Congress, any person who has the required age, citizenship, and residence. 1 Hinds' Precedents of the House of Representatives, Sections 415, 416; 1 Bartlett, Cases of Contested Elections, pp. 167, 168, 169. Quoted 141 A.2d at 910.

The Maryland court, in *Shub v. Simpson*, 196 Md. 177, 76 A.2d 332 (1950), had earlier invalidated a state statute that required a candidate for Congress to execute an oath under that state's subversive activities act. The court held that such an oath would impose an additional qualification to those named in the federal Constitution and could not stand. See also, 1 Story, *Commentaries on the Constitution of the United States*, (4th Edition), Section 625; 1 Willoughby, *Constitutional Law of the United States*, (Section Edition) Section 337.

Similar attempts to add qualifications to the office of Representative or Senator have been struck down by other state courts, *Danielson v. Fitzsimmons*, 232 Minn. 149, 44 N.W.2d 184 (1950) (conviction of a felony); *State ex rel. Sundfor v. Thorson*, 72 N.D. 246, 6 N.W.2d 89 (1942) (prohibition of defeated primary candidate from running in general election); *Ekwall v. Stadelman*, 146 Ore. 439, 30 P.2d 1037 (1934) (prior oath by judge that he would accept no

other non-judicial office during his term); *State v. Crane*, 65 Wyo. 189, 197 P.2d 864 (1948) (governor not eligible for elective office during his term); *Stockton v. McFarland*, 56 Ariz. 138, 106 P.2d 328 (1940) (judges not eligible for elective office during term); *State ex rel. Wettengel v. Zimmerman*, 249 Wis. 237, 24 N.W.2d 504 (1946) (petition to remove Joe McCarthy from Senate ballot because he was a judge, dismissed); *State ex rel. Chandler v. Howell*, 104 Wash. 99, 175 P. 569 (1918) (judge ineligible for other office).³⁴

Nor have the lower federal courts, with the exception of the District Court below, failed to recognize the exclusive nature of the Article I, §2, cl. 2 qualifications. In *Dillon v. Fiorina*, 340 F.Supp. 729, 731 (1972) a three-judge district court for the District of New Mexico struck down a state statute requiring a candidate for a party's nomination to have been a registered party member for at least a year before the primary. ("The New Mexico scheme adds an impermissible requirement of at least two years residency to the qualifications for United States Senator and is therefore void.") See also, *Stack v. Adams*, 315 F.Supp. 1295, 1298 (N.D. Fla. 1970) (candidate must resign from state office), in which the three-

³⁴Two statutes, none of which constituted the irrevocable and permanent disability which the California statutes place on a candidate, have been upheld by state courts. The Maryland Court of Appeals upheld a requirement that the candidate appoint a campaign manager, *Secretary of State v. McGucken*, 244 Md. 70, 222 A.2d 693 (1966), and a Florida statute providing that current officeholders could not run for concurrent office, was upheld in *Holley v. Adams*, 238 S.2d 401, 408 (1970). *McGucken* was decided before *Powell*. *Holley* did not cite *Powell*.

judge district court relied on *Powell, supra*, as having disposed of the qualification question; *Exon v. Tiemann*, 279 F.Supp. 609 (D.Neb. 1968) (state cannot require Congressman to live in district from which he was nominated).

B. California Elections Code Sections 6830(c) and 6830(d) add Qualifications for the office of Member of Congress.

It may be argued that any scheme which makes, as does the California scheme, it virtually impossible for an independent candidate to secure a place on the ballot, is in fact a "qualification" for members of Congress. It matters not that California does not regulate the age, residence or citizenship of a candidate for office, if, by other means such as the statutory scheme involved here, it could exclude all but a small proportion of persons who otherwise meet the qualifications enumerated in Article I, §2, cl. 2. Although Article I, §4, cl. 1 permits the state to regulate the time, place and manner of elections, at some point such regulations might become so oppressive as to constitute an added qualification for office in derogation of the requirements of Article I, §2, cl. 2. That issue need not be reached here, however, for Code Sections 6830(c) and 6830(d) present clear additional requirements to candidacy, requirements which do not relate to the time, place and manner of the election in question. A person who desires to run as an independent must wait a full year after leaving his or her party before doing so, and he or she must give up the right to vote at the next preceding primary, including the right to vote for local and state candidates and for questions

presented to the voters. Although Storer did not vote for a Congressional candidate at the next preceding election, Appendix, p. 12, he refused to give up his right to vote for other offices and was thus barred from the ballot by virtue of §6830(c). Similarly, having left the Democratic Party at the beginning of the Presidential Campaign, he was barred from the ballot by virtue (or lack thereof) of §6830(d).

The qualifications are not innocuous—indeed, in Storer's case they simply could not be met. California, ironically, asks would-be independent candidates for Congress to give up the right to vote, that fundamental right which is "preservative of all other rights." *Dunn v. Blumstein*, 405 U.S. 330, (1972). And it disqualifies as independent candidates those persons who have just left a party, those whose political feeling runs high and who are prepared to offer the electorate enormous energy and concern.

It is arguable that if someone had sufficient help and large amounts of money he might have been able to meet the onerous burden set forth by the operation of California Elections Code §§6833, 6864 and 6831. It is unlikely but it is conceivable. The entire California electorate, however, could not have got Thomas Storer on the ballot for Congress. The qualification was personal to him and irremedial. And it violated the clear and exclusive qualifications of Article I, §2, cl. 2.

In *Fowler v. Adams*, 315 F.Supp. 592 (M.D. Fla. 1970), *injunction granted*, 400 U.S. 1205 (1970); *appeal dismissed*, 400 U.S. 986 (1971), a three-judge

district court agreed that a state could not set added qualifications for Congress, but held that a filing fee was not such an added qualification. The court held that a fee was not "personal" to the candidate, since others could pay it for him. Whatever the merits of that argument (see, *Bullock v. Carter*, 405 U.S. 134 (1972), striking down a similar fee as violative of the Fourteenth Amendment), it is clear that Storer's disqualification is personal to him. There was no way he could secure a place on the ballot in the face of §§6830(c) and 6830(d).

California Elections Code Sections 6830(c) and 6830(d), by adding qualifications to the office of Member of Congress, violate the express terms of Article I, §2, cl. 2 and cannot stand. If Congress itself may not add to the qualification required of its own members, *Powell v. McCormack*, 395 U.S. 496 (1969), surely the state legislators may not.³⁵ The people of California have a right to choose their representatives in the national government unrestricted by the state government's notion of the qualifications required by those representatives.

³⁵California, by adding qualifications which keep candidates off the ballot, also makes it impossible for the House to exercise its judicial function under Article I, §5, cl. 1 in judging the qualifications of members, since Storer can never get to the House for a determination of the validity of §§6830(c) and 6830(d). See, *Powell, supra*; "The Supreme Court, 1968 Term," 83 *Harv. L. Rev.* 7, 68 (1969); William McCreery, Tenth Congress, 1807, 1 *Hinds* §414.

CONCLUSION

The latest public opinion polls report a dramatic decline in the people's trust of government—a decline that is all the more disturbing in an election year when the voters had an opportunity to register their disapproval by electing new officials.

But the electoral choices did not seem attractive to large numbers of citizens. To them the political air was stagnant and the dialogue pointless. In California, new registrants are declining to affiliate with any political party in unprecedented numbers. In some counties the number of new registrants who identify themselves as independents exceeds the number of new Republican registrants and threatens the Democrats.

Surely these people have a right to run for office and just as surely they have the right to choose from among candidates other than those designated by the political parties with which they refuse to affiliate.

It was not the intent of the Framers to limit the electorate's choice to Democrats and Republicans, there being no Democrats or Republicans at the time the Constitution was adopted. They envisioned an open society, free of governmentally imposed political orthodoxy, in which the ballot would be a mirror genuinely reflecting the will of the people. California's election laws are not consistent with that vision; they affront it and work to blur it.

For all the reasons mentioned, appellants respectfully urge that the judgment of the United States

District Court for the Northern District of California should be reversed.

Dated, San Francisco, California,
May 18, 1973.

Respectfully submitted,
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MICHAEL DOMAL, JR.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-6050

LAURENCE H. FROMMHAGEN,
Appellant

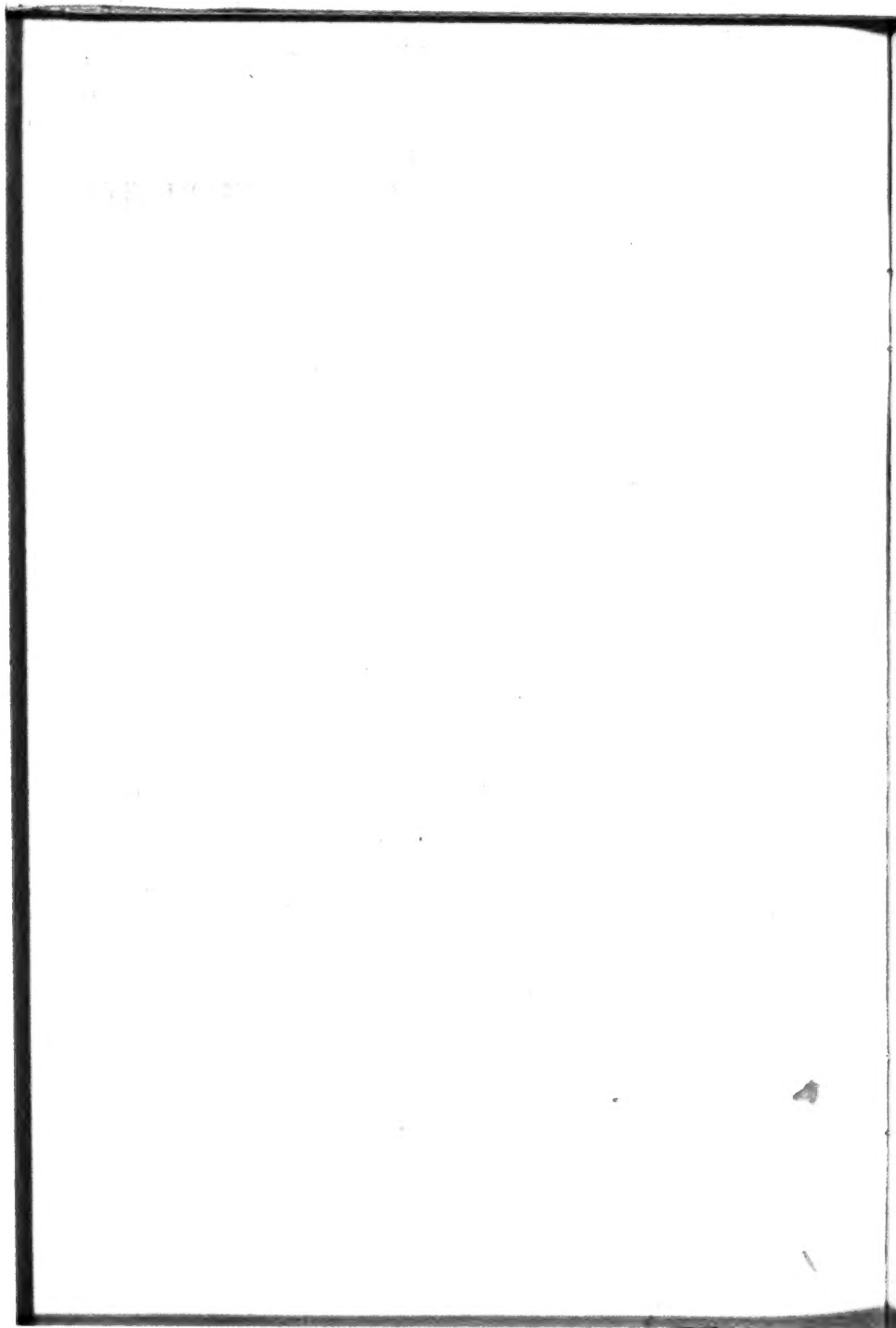
v.

EDMUND G. BROWN, JR.,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,

BRIEF OF APPELLANT

LAURENCE H. FROMMHAGEN
In Propria Persona
P.O. Box 326
Soquel, California 95073



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-6050

LAURENCE H. FROMMHAGEN,
Appellant

v.

EDMUND G. BROWN, JR.,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF APPELLANT

JURISDICTION

Frommhagen asserts and incorporates by reference the jurisdiction alleged in the Brief of Appellants in *Thomas Tone Storer v. Edmund G. Brown, Jr.*, No. 72-812, presently before this Court.

OPINION BELOW

The Opinion of the District Court is shown in the Appendix, pg. 84.

QUESTIONS PRESENTED HEREIN

Frommhagen presents the same questions as posed by the appellants in *Thomas Tone Storer v. Edmund G. Brown, Jr.*, No. 72-812.

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED

Appellant cites as the constitutional and statutory provisions involved those cited in *Thomas Tone Storer v. Edmund G. Brown, Jr.*, namely: Constitution of the United States, First and Fourteenth Amendments and Article I, Section 2, Clause 2; Sections 6830, 6831, 6833, 6864, 6430 and 6082 of the California Elections Code.

STATEMENT OF CASE

Laurence H. Frommhagen was an independent (non-partisan) candidate for the United States House of Representatives in the Twelfth Congressional District (Counties of Santa Cruz, Monterey and San Luis Obispo) of California, but was unable to have his name appear on the ballot due to the enforcement by Secretary of State Edmund G. Brown, Jr., of those sections of the California Elections Code complained of in this action.

Frommhagen, a research scientist who holds a Ph.D. degree from the University of California at Berkeley in biochemistry, has been active for fifteen years in the federal and state legislatures as a citizen consultant in the areas of scientific research, health and welfare.

In 1971 Frommhagen, who for the previous nineteen years had been a registered member of the Republican Party and who had worked actively in the campaigns of a number of Republican candidates, reacted to the growing authoritarian character of the Republican Party (which now borders on fascism, as revealed by the Watergate scandal) by changing his voter registration to that of the Democratic Party. It was not long until he became disillusioned with the Democratic Party as he viewed the splintering of the several ideological and social groups which constitute that "coalition" and the control of that party by special interests and 'fat cats' not very different from those who constitute the upper echelons of the Republican Party.

In March of 1972, in a move which paralleled that of Thomas Tone Storer, Frommhagen announced that he had changed his voter registration to that of "decline to state" (the only category presently provided by California law to nonpartisans) and that he would seek election to Congress as a nonpartisan candidate (Appendix, pg. 66). In June of 1972 Frommhagen and his supporters, who had encountered the same disabilities from the operation of certain sections of the California Elections Code as had Thomas Tone Storer, filed a Motion for Intervention in the action of *Storer v. Brown, Jr., et al.* (Appendix, pg. 56). That motion was granted by the Court on July 20, 1972 (Appendix, pg. 68). Frommhagen represented himself in the Court below (Appendix, pg. 69 through 83) and presented oral argument before the Court. After the adverse decision of the District Court (Appendix, pg. 84 et seq.), Frommhagen filed a separate appeal to this Court, largely because he wished to be disassociated from the motives, allegations and objectives of Communist candidates Hall and Tyner, whose concurrent action had been consoli-

dated in the Court below with *Storer v. Brown, Jr.* Frommhamen, who does not speak from any feelings as to persons but who admits to a strong aversion against communist doctrine, believes that any member of a political party, Communist or otherwise, who seeks to masquerade as a nonpartisan, engages in a species of intellectual dishonesty which should not be foisted upon gullible or ignorant members of the general public. However, the problem of identifying true nonpartisans will not be resolved in this forum, but rather is a matter with which only the State legislature can deal. Indeed Frommhamen has expended much effort in recent days consulting with members of the California Legislature as to how the Elections Code might be changed not only to end discrimination against nonpartisan candidates but as to how to identify bona fide nonpartisan candidates for the benefit of the voting public.

It is Frommhamen's earnest belief that political parties, controlled by large business or labor interests and by those of great wealth, can no longer, in theory or in practice, minister in an effective and credible manner to the needs of a complex, ever more rapidly changing, society. Homo sapiens will survive only if men, motivated not by a party's special interests, but by objectivity, rationality and compassion, are permitted to govern the nation with the consent of the citizenry. Frommhamen is not so much interested in running for office as he is in establishing that nonpartisans, as guaranteed by the United States Constitution, may be a candidate for office on an equal footing with party candidates. There can be no doubt that party agencies have so seized control of legislative, executive and judicial functions at all levels of government that the State of California has been able to discriminate against nonpartisan candidates by means of

those sections of the California Elections Code complained of in this action.

That discrimination was directed not only against Storer and Frommhagen but also against their plaintiffs, members of the Democratic and Republican Parties as well as Independents, who desire to support Storer and Frommhagen by signing the nomination papers of the two candidates.

SUMMARY OF ARGUMENT

In view of the fact that the very competent Brief of Appellants in *Storer v. Brown, Jr.*, No. 72-812 states fully the arguments of Frommhagen, and in order to avert redundancy, Frommhagen adopts and incorporates by reference the Summary of Argument in said Brief of Appellants.

In the following sections certain arguments are presented to reinforce and augment those in the Brief of Appellants in *Storer v. Brown, Jr.*

I.

THE FREE CIRCULATION OF NOMINATING PETITIONS IS VITAL TO AN UNFETTERED ELECTORAL SYSTEM

In *Jenness v. Fortson*, 403 U.S. 431 (1971) the Court commented favorably upon the unrestrictive independent nomination procedure in the State of Georgia by stating that said State "imposes no suffocating restrictions whatsoever upon the free circulation of nominating petitions." That procedure in the State of Georgia, which equates to that which Frommhagen accepts as a fair and reasonable alternative to the California procedure, provides for obtaining the signatures of 5% of the eligible electorate on the nominating petition, but permits a six

month period in which to gather the signatures. In addition, the voter may sign the nominating petition of a nonpartisan candidate even though he signs the petition of another candidate and even though the citizen votes in the primary election.

The restrictions placed by California upon the gathering of signatures on the nonpartisan's nomination papers serve no other purpose than to hobble the nonpartisan candidate in violation of those constitutional provisions which dictate that all candidates be on an equal footing if they meet age and citizenship requirements. Indeed an unfettered nonpartisan nomination procedure is the purest expression of constitutional intent.

II.

THERE ARE NO ALTERNATIVES TO AN UNFETTERED NONPARTISAN NOMINATION PROCEDURE

In his representations to the Court below appellee Brown urged that Storer and Frommhamen enjoyed perfectly acceptable alternatives in those sections of the California Elections Code which permit new parties to appear on the ballot and which provide for write-in votes.

It is indicative of the rigidity engendered by the devotion of the appellee and of the members of the Court below that it was even suggested that a nonpartisan form a party to sustain and promote his candidacy. If Frommhamen were to so forsake his principle, he would have to form a state-wide party by obtaining a number of signatures in excess of the total number of registered voters in the Twelfth Congressional District of California, simply to run as a candidate for Congress in that district.

As to the write-in procedure Justice William O. Douglas stated the situation well in *Williams v. Rhodes*, 393 U.S. 23, at page 35:

"... Furthermore, even when operative, the write-ins are no substitute for a place on the ballot.

To force a candidate to rely on write-ins is to burden him with disability. It makes it more difficult for him to get elected, and for the voters to elect him ... "

Anyone who has observed elections over the years and at different levels of government is impressed with the waste of time and effort which is the lot of a great majority, approaching 99%, of write-in candidacies.

III.

A LAUNDRY-LIST BALLOT WILL NOT RESULT FROM AN UNFETTERED NONPARTISAN NOMINATION PROCEDURE

The Secretary of State in Georgia (Exhibit 1) has stated that no candidates qualified to run as independent candidates for the United States House of Representatives in the general elections of 1968, 1970 and 1972.

It is apparent that the requirement that a nonpartisan obtain the signatures of at least 5% of the electorate, and the \$480. filing fee, are sufficient to preclude a laundry-list ballot.

Furthermore, this Court observed in *Williams v. Rhodes*, 393 U.S. 23, at page 33:

"But the experience of many States, including that of Ohio prior to 1948, demonstrates that no more than a handful of parties attempts to qualify for ballot positions even when a very low number of signatures, such as 1% of the electorate, is required. It is true that the existence of multitudinous fragmentary groups might justify some regulatory control but in Ohio at the present time this danger seems to us no more than "theoretically imaginable."

There is no reason to believe that the situation would be different in respect to individuals seeking ballot position as nonpartisans within the context of an unrestrictive nonpartisan nomination procedure.

IV.

A NONPARTISAN CANNOT BE CONSIDERED TO BE A "PARTY-HOPPER" OR "PARTY RAIDER"

There is no logic in the position of the appellee and of the members of the Court below that a nonpartisan, if he chooses to run as a candidate, is a "party-hopper" or a "party-raider."

Those phrases, together with the phrase "laundry list ballot", are little more than code words for discrimination against nonpartisans by devoted members of political parties, especially the two dominant parties, who fear greatly the rising numbers of independents and the increasing sophistication of a swelling multitude of voters who do not hesitate to split their voting tickets (Appendix, pg. 77).

V.

THE STATE MAY NOT ENFORCE LOYALTY TO A PARTY

Several years ago voters in the State of South Carolina were required to take an oath at the primary election to "abide by the results of said primary and to support in the next general election all candidates nominated in said primary." In *Redfearn v. Board of Canvassers*, 234 S.C. 113, 107 S.E. (2) 10, the Supreme Court of that State struck that oath on the ground that the State could not legally or constitutionally enforce party loyalty.

California has gone a step further by forbidding party members as well as nonpartisans who vote in the primary elections to sign effectually the nomination papers of a nonpartisan. If, on the other hand, a nonpartisan or a party member wishes to support a nonpartisan candidate by signing his nomination papers that elector must forego the primary election, thereby forfeiting the right to vote on questions before the electorate, such as bonds, composition of local boards and commissions, state propositions, etc., and, in the case of party members, to vote on party candidates. That provision of the California Elections Code is so obviously in violation of the First and Fourteenth Amendments to the United States Constitution as to be seen readily as a mechanism for suffocating the right of a nonpartisan to stand for election on an equal footing with the party candidate.

VI.

THE RULING OF THE DISTRICT COURT THAT NONPARTISANS WHO VOTE IN THEIR PRIMARY ELECTION MAY NOT SIGN THE NOMINATION PAPERS OF A NONPARTISAN DEMONSTRATES THE BIAS OF THAT COURT IN FAVOR OF POLITI- CAL PARTIES AND THEIR CANDIDATES

Despite arguments to the contrary by plaintiffs and defendants in the Court below, the District Court, in a remarkable demonstration of its bias in favor of political parties, ruled that even nonpartisans who vote in their nonpartisan primary may not sign the nominating papers of a nonpartisan candidate. It is significant that the Court did not attempt to justify that ruling. The Opinion of that Court, which rings with such phrases as "laundry list ballots", "party-raiding" and "party-hopping" is mani-

festly the work of those devoted more to political parties than to the Constitution of the United States. It is to be fervently hoped that at some time in the future the appointments of members of the judiciary may be freed from the constraints of party agencies.

VII.

DISCRIMINATION AGAINST NONPARTISAN CANDIDATES IS SHOWN IN THE FACT THAT THE CALIFORNIA ELECTIONS CODE PERMITS PARTY CANDIDATES EIGHT MONTHS OF ACCESS TO THE PUBLIC MEDIA BUT ONLY TWO MONTHS TO THE NONPARTISAN CANDIDATE

The party candidate who wins his party's nod at the primary election enjoys access to the public media, and equal time by provision of Section 315 of the Federal Communications Act for exposure in the public media, from his filing as a primary candidate in March to the general election in November. By contrast, the non-partisan candidate becomes a qualified candidate, by definition of the Regulations of the Federal Communications Commission, with access to the public media equal to the party candidate only in the September before the November general election, a short period of two months. In his Motion to Affirm (pg. 18) appellee states that this situation is "merely part and parcel of the legal and practical differences in the logistics of political life" (yet another code phrase for discrimination). Rather it is no accident that the party members who framed those sections of the California Elections Code postponed the gathering of signatures on the nominating petition to three weeks in August and the certification of the nonpartisan candidate to early September.

There is no reason, except for an intent to discriminate, why nonpartisan candidates cannot gather their signatures on their nominating petitions during the period of March through June, when party candidates are campaigning for the primary election, and why nonpartisan candidates cannot be certified as soon as they file their nominating petitions complete with the signatures of 5% of the eligible electorate. However, the California Elections Code has been so constructed as to give party candidates "first crack" at the electors.

CONCLUSION

For all the reasons mentioned in this Brief and in the Appellant's Brief in *Storer v. Brown, Jr.*, appellant respectfully urges that the judgment of the United States District Court for the Northern District of California should be reversed.

Respectfully submitted,

LAURENCE H. FROMMHAGEN
In Propria Persona
P.O. Box 326
Soquel, California 95073

Dated: May 29, 1973

EXHIBIT 1

**SECRETARY OF STATE
214 State Capitol
Atlanta
30334**

May 25, 1973

**Mr. Laurence H. Frommhamen
P.O. Box 326
Soquel, California 95073**

Dear Mr. Frommhamen:

This will acknowledge receipt of your letter of recent date. The Official Tabulations which were originally certified to you also contained the election results for U.S. Senator and Governor for the years 1968, 1970 and 1972.

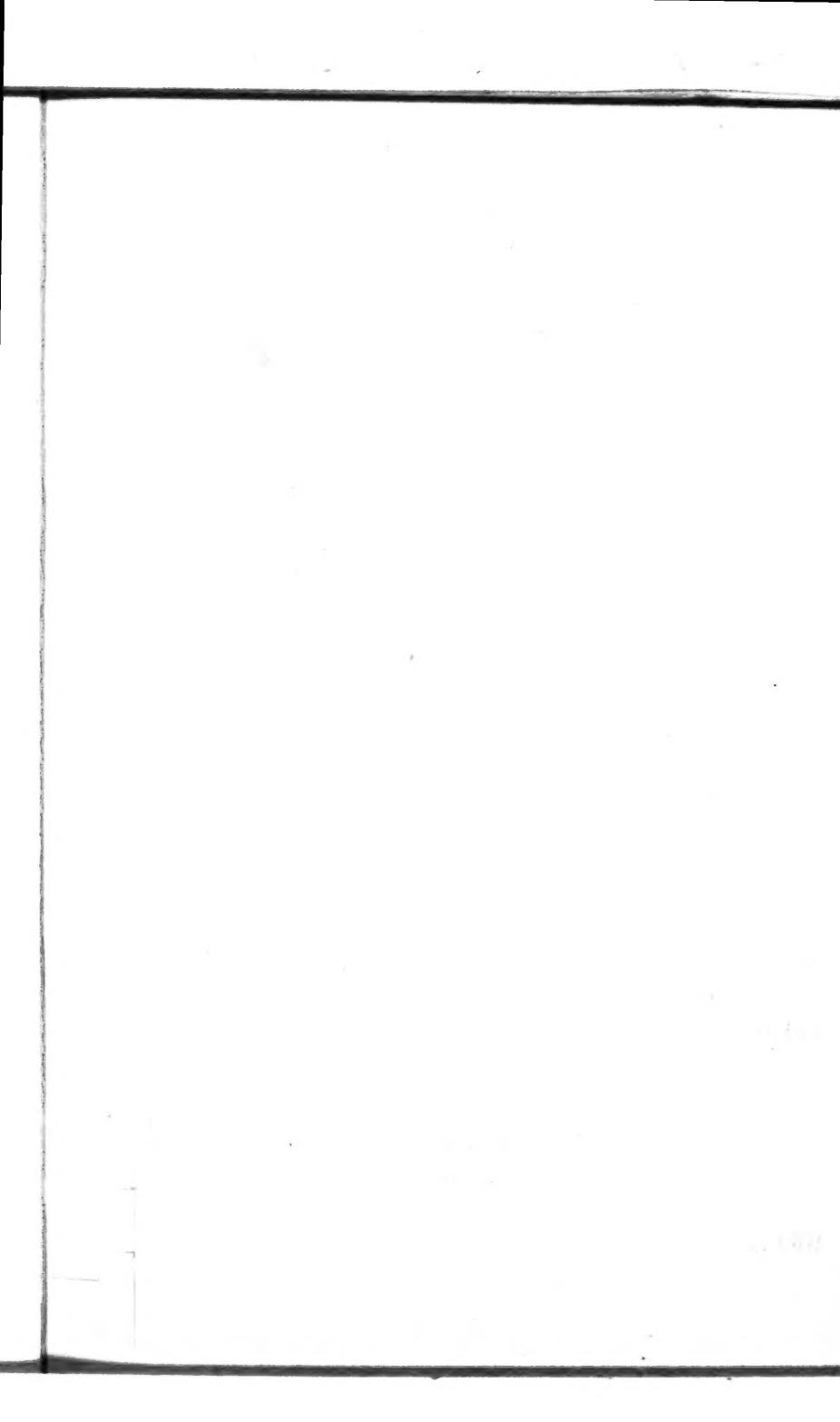
You would be correct in stating that no independent qualified to have his name placed on the Ballot for U.S. House of Representatives in 1968, 1970 and 1972.

If I can be of further service to you, do not hesitate to call on me.

Sincerely yours,

**Ben W. Fortson, Jr.
Secretary of State**

BWF:jc



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In the Supreme Court of the
United States

16 1973

OCTOBER TERM, 1972

No. 72-812

No. 72-6050

THOMAS TONE STORER, et al., *Appellants*,

vs.

EDMUND G. BROWN, JR., et al., *Appellees*.

GUS HALL, et al., *Appellants*,

vs.

EDMUND G. BROWN, JR., *Appellee*.

LAURENCE H. FROMMHAGEN, *Appellant*,

vs.

EDMUND G. BROWN, JR., *Appellee*.

On Appeal from the United States District Court
for the Northern District of California

Brief of Appellee
Edmund G. Brown, Jr.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-812

No. 72-6050

THOMAS TONE STORER, et al., *Appellants*,

vs.

EDMUND G. BROWN, JR., et al., *Appellees*.

GUS HALL, et al., *Appellants*,

vs.

EDMUND G. BROWN, JR., *Appellee*.

LAURENCE H. FROMMHAGEN, *Appellant*,

vs.

EDMUND G. BROWN, JR., *Appellee*.

On Appeal from the United States District Court
for the Northern District of California

Brief of Appellee
Edmund G. Brown, Jr.

OPINION BELOW

The Opinion and Order concurred in unanimously by the three judge federal court and which is applicable to the above entitled cases which this Court has consolidated is set forth at pages 84 to 91 of the Appendix.

QUESTIONS PRESENTED

1. Does California law, which in its totality provides alternative means for running for office and associating for the advancement of political beliefs, and which in no way freezes the political status quo, violate the fundamental rights of the appellants under the First and Fourteenth Amendments?

2. Assuming, *arguendo*, that the California Independent Nomination Procedure must be examined in a vacuum, do any of its substantive provisions violate the fundamental rights of the appellants?

3. Assuming, *arguendo*, that one or more of the substantive provisions of the California Independent Nomination Procedure are constitutionally objectionable, should these not be severed from this law, leaving the remaining substantive provisions operative?

4. Does California law, which permits an individual to run for Congress either as the nominee of any qualified political party to which he may belong or as a write-in candidate, add an additional qualification to the office of United States Representative merely because it restricts independent nominees to persons who did not vote at the primary election or who did not leave a qualified party within the year prior to the primary election?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The main constitutional and statutory provisions involved herein are:

1. United States Constitution, article I, section 4, clause 1 and article II, section 1, clause 2 granting states broad powers to regulate elections for Congress and choosing electors for President.

2. California Constitution, article II, section 4, as added November 7, 1972, requiring primary elections including an open presidential primary.

3. California Elections Code, section 6430 defining "qualified parties."

4. California Elections Code, sections 6800 through 6920, providing the Independent Nomination Procedure.

5. California Elections Code, section 48 providing for severability of invalid provisions.

6. California Elections Code, sections 6260 through 6263, 10229 and sections 18600 through 18604 providing for write-in votes. See also sections 10213, 10228, 10292 and 10317.

7. California Elections Code, sections 6401, 6402(a) and 6611 and specifically sections 6801, 6830(c) and 6830(d) of the Independent Nomination Procedure, *supra*, all relating to maintaining party integrity.¹

STATEMENT OF THE CASE

In January 1972, appellant Storer and the American Civil Liberties Union decided to challenge California's Independent Nomination Procedure in order that Mr. Storer might have his name placed on the ballot as an independent candidate for Congress at the November 1972 general election. See Exhibit A to appellee's Points and Authorities filed August 18, 1972.

On May 30, 1972, appellant Storer and his supporters filed their action to attempt to invalidate all the substantive provisions of the Independent Nomination Procedure, claiming the *combined* effect of these provisions was to make it virtually impossible for Mr. Storer to attain ballot

1. Hereinafter, all section references will be to the California Elections Code unless otherwise indicated. Because of the bulk of code sections referred to in this brief, only key sections are included in the appendices herein.

status as an independent candidate for Congress at the November 1972 general election. Appendix, pp. 6, 11. Additionally, Mr. Storer challenged the Independent Nomination Procedure insofar as it restricts candidates to persons who did not vote at the preceding primary election, or who did not leave a qualified party within the 12 months preceding such primary election. The claim was that such constituted an additional qualification for Congress. Appendix, pp. 15-16. On August 8, 1972, Mr. Storer's action was served upon appellee along with his motion for a preliminary injunction attempting to gain ballot status with only 40 signatures instead of the 9,500, or the 5 percent required by law. Appendix, pp. 24, 85.

In the meantime, appellant Frommhagen and his supporters moved to intervene in the Storer action, which the court granted, making a similar claim as to the *combined* effect of the substantive provisions of the Independent Nomination Procedure and its effect upon candidates for Congress. They also sought ballot status for Mr. Frommhagen as an independent nominee for Congress in November 1972, with the benefit of only 40 signatures instead of 7,500, or the 5 percent required by law. Appendix, pp. 57, 60 (par. V), 62-65, 86. They similarly moved for a preliminary injunction to attempt to gain ballot status in November 1972, with only 40 signatures. Appendix, p. 69.

Neither in the Storer action nor the Frommhagen action was it seriously urged that the 5 percent signature requirement *by itself* was unconstitutional. Its constitutionality appears to have been conceded by Storer in oral argument. Rep.Tr. 8-9. As to Mr. Frommhagen, he advised the court in a supplemental brief that he "does not quarrel with the number of signatures to qualify an independent candidate." Appendix, p. 80. Despite this fact, there is no indication that either appellant attempted to collect the requisite num-

ber of signatures. As to signatures, the number 40 was selected because that is the number of sponsors a member of a qualified party must have to be a candidate for his party's nomination for Congress *at the primary election*. § 6495. A party candidate would, of course, have had to win at the primary election to have had ballot status in November 1972.

On August 18, 1972, appellee Secretary of State filed his opposition to granting of the requested preliminary injunctions, and his motion to dismiss on various grounds, including the ground that the complaints failed to state a claim upon which relief could be granted. Appendix, pp. 25-26.

Meanwhile, on August 11, 1972, appellants Hall and Tyner and their supporters filed another action also attacking the *combined* effect of the substantive provisions of the Independent Nomination Procedure upon their efforts to have Messrs. Hall and Tyner appear on the November 1972 general election ballot as "independent" nominees for President and Vice President, though they admittedly are members of the Communist Party, an unqualified party in California. Appendix, pp. 33, 34, 37 (pars. II, III, VIII). These candidate-plaintiffs whose party apparently could not meet the reasonable requirements of section 6430 to qualify for ballot status, also chose their own procedure. They sought ballot status on the "basis of percentage," (see § 6080), that is, the number of signatures which were required in 1972 to qualify a slate of delegates to appear on the Republican *primary election* ballot in 1972 to attend the national convention. This figure was alleged to be 18,000 instead of the 325,000 signatures, or the 5 percent required by law for an independent nomination. Appendix, pp. 37, 42. Hall and Tyner also moved for a preliminary injunction. Appendix, p. 46.

On August 25, 1972, appellee Secretary of State filed his opposition to the granting of a preliminary injunction, and his motion to dismiss the *Hall* case on numerous grounds, including the ground that the complaint failed to state a claim upon which relief could be granted. Appendix, p. 51.

On August 31, 1972, oral argument was heard by the three judge federal court in the *Storer* and *Frommhagen* case. The reporter's transcript is part of the record herein.

Since both cases, *Storer* and *Hall* were assigned to the same three judge court, counsel stipulated that *Hall* would be submitted on the briefs and the argument in *Storer*.²

On September 8, 1972, the three judge federal court issued its Opinion and Order holding California's Independent Nomination Procedure valid essentially on the grounds that there are sufficient alternative means of access to the ballot in California so as to satisfy the First and Fourteenth Amendment rights of the plaintiffs. Appendix, p. 84 *et seq.* Appellants *Storer* and *Hall* appealed on September 13, 1972.

On September 15, 1972, Justice Douglas denied a stay, after hearing oral argument in Goose Prairie, Washington.

On October 10, 1972, Mr. Frommhagen filed his separate appeal.

On March 5, 1973, this Court noted probable jurisdiction and consolidated the cases for purposes of this appeal.

By letter dated March 30, 1973, the Committee for Democratic Election Laws requested that we agree to their filing an amicus curiae brief attacking solely the 5 percent signature requirement of the Independent Nomination Procedure. We declined primarily on the basis that such would interject a new issue into this case, as discussed above. The

2. Thus in *Hall* there was also no serious contention that the 5 percent signature requirement, standing alone, is unconstitutional.

Committee thereafter apparently moved the Court to file such a brief, which motion was granted on May 7, 1973. Appellee Brown did not receive a copy of the motion before said date, nor has he yet received a copy.

This brief is filed as a single response to the briefs in the *Storer* and *Hall* cases, the brief in the *Fromm* case, and the brief filed by the Committee for Democratic Election Laws.

SUMMARY OF ARGUMENT

In *Williams v. Rhodes*, 393 U.S. 23 (1968), this Court struck down Ohio's election laws on the grounds that Ohio made it virtually impossible for any party other than the Republican or Democratic Parties to participate in the presidential election in 1968. A third party could not qualify for ballot space in Ohio because of the stringent requirements of its laws.

In *Jenness v. Forston*, 403 U.S. 431 (1971), this Court upheld the 5 percent signature requirement for a "political body" or independent to gain access to the ballot in Georgia. In so doing, the Court pointed out that Ohio's laws were held unconstitutional in *Williams v. Rhodes*, *supra*, 393 U.S. 23 (1968), because Ohio's laws, *taken in their totality*, froze the political status quo. In upholding Georgia's 5 percent signature requirement the Court did so on the basis that Georgia's laws, unlike Ohio's, did not freeze the status quo, but recognized the fluidity of political life.

Likewise, California's election laws, in their totality, recognize the fluidity of political life and in no way freeze the political status quo. California provides many alternative means for parties and individuals to participate in its electoral process. Parties may qualify for ballot space pursuant to section 6430 under three alternatives. Independents, or persons not members of qualified parties, may utilize the

Independent Nomination Procedure. Write-in candidacy is also provided for in both the primary and general elections. In fact, in 1968 two new parties qualified for ballot positions under the lenient 1 percent registration requirements of section 6430, subdivision (c). These were the Peace and Freedom Party and the American Independent Party. Also in November 1972, an individual qualified for and ran for State Assembly as an independent candidate.

In tailoring its election laws, States may recognize as legitimate and compelling state interests such factors as (1) a manageable ballot (2) a significant modicum of support for parties or candidates (3) protection of the party system (not two particular parties) and (4) that the winning candidate reflects the will of the majority, or at least a strong plurality, of its citizens.

California's election laws reflect a reasoned intermeshing of provisions to further these legitimate and compelling state interests while at the same time insuring the fluidity of political life. There is no federal constitutional right to an Independent Nomination Procedure. Nor should such procedure be examined in a vacuum in determining the validity of California election laws. In partisan races, the Independent Nomination Procedure provides candidates for the general election *after* political parties have nominated candidates at partisan primaries for partisan offices. It is indeed a legislative bonus. Individuals already have had an opportunity to freely associate and form new parties under section 6430. Their constitutional rights are protected by such section. They could be "independents" who might designate themselves as the "Disaffected Party" or some such appellation to show their dissatisfaction with the present political parties. Therefore, the Independent Nomination Procedure supplies *an additional alternative for the disaffected.*

As to candidates themselves, there is no constitutional right to have one's name printed on the ballot. For individuals who do not elect to associate for the formation of new parties, or who are unable to garner the necessary support for ballot status as an independent, the write-in process satisfies their rights to participate in the electoral processes.

However, assuming, *arguendo*, that the Independent Nomination Procedure must be examined in a vacuum, contrary to the Court's approach in *Jenness v. Forston*, *supra*, 403 U.S. 431 (1971), its provisions further legitimate and compelling state interests. The 5 percent signature requirement of section 6831 insures the significant modicum of support to prevent proliferation of the ballot. Section 6830(c), insofar as it prohibits persons who voted at the preceding primary from signing independent nomination petitions is a recognized, valid provision, which promotes party integrity, and prevents party splintering. Likewise, section 6830(c), insofar as it prohibits persons who voted at the preceding primary from being independent candidates, as well as section 6830(d) which prevents an individual who has defected from a qualified party within 12 months of the primary election from being an independent nominee, also promote the compelling state interest of party integrity and preservation of the party system. These provisions are really part and parcel of a series of sections found in *both* the primary laws and the Independent Nomination Procedure furthering such proper state interest and goal.

The 24-day requirement for the collection of signatures insures that signatures are collected at about the time party platforms are adopted in California. It also promotes the interest of the state in seeing that petitions reflect the current attitude of voters, while also permitting time to prepare for the election.

As to the claim that section 6830, subdivisions (c) and (d) place additional qualifications for Congress, such is in error. Even assuming that such section prohibits a person from being a candidate who voted a *nonpartisan* ballot at the primary, such section does not constitute an absolute bar to candidacy. Nor does the fact that the individual concerned may have defected from a recognized political party constitute an absolute bar. The individual may still be a write-in candidate. These prohibitions are, therefore, regulations, not qualifications for office.

In that section 6430 already protects the rights of individuals and potential candidates to associate and form new political groups (even should they be the disaffected), and, therefore, the Independent Nomination Procedure is a truly legislative bonus, such procedure's impact on the voters is not sufficiently great as to require application of the "close scrutiny test," but should be sustained on the rational basis test. See *Bullock v. Carter*, 405 U.S. 134, 142-43 (1971). However, the procedure also meets the close scrutiny test.

If, however, the Court should find that any of the numerous substantive provisions of the Independent Nomination Procedure are invalid, then, under the legislative direction of section 48, these should be severed, leaving the remaining portions intact.

As to the brief of the Committee for Democratic Election Laws, such raises new issues not raised below, is inaccurate, and we submit, is an improper attempt to try factual matters before this Court for the Socialist Workers Party which were not submitted to the lower court.

ARGUMENT

I. California's Election Laws Do Not Freeze the Political Status Quo, But Recognize the Fluidity of American Political Life

Apparently to some, the case of *Williams v. Rhodes*, *supra*, 393 U.S. 23 (1968), appeared to be the "open sesame" for the invalidation of state electoral systems. For example, in *Jenness v. Forston*, 403 U.S. 431 (1971), the Court was faced with an attack on Georgia's electoral system by the Socialist Workers Party based upon the decision in *Williams v. Rhodes*. If construed too broadly, such decision might lead one to believe that any party or group, no matter how small, has a constitutional right to have its candidates' names printed on the ballot.

The Court, however, in *Jenness v. Forston*, *supra*, 403 U.S. 431 (1971), dispelled such overly broad possible implication of its 1968 decision pointing out that:

"In the *Williams* case the court was confronted with a state electoral structure that favored 'two particular parties—the Republicans and the Democrats—and in effect tend[ed] to give them a complete monopoly'...." *Id.* at 434.

The Court in *Jenness v. Forston* further pointed out that in *Williams v. Rhodes*:

"In a separate opinion Mr. Justice Douglas described the then structure of Ohio's network of election laws in accurate detail:

"Ohio, through an entangling web of election laws, has effectively foreclosed its presidential ballot to all but Republicans and Democrats. It has done so initially by abolishing write-in votes so as to restrict candidacy to names on the ballot; it has eliminated all independent candidates through a requirement that nominees enjoy the endorsement of a political party; it has defined "political party" in such a way

as to exclude virtually all but the two major parties.' ...*Id.* at 436.

Thus in *Jenness v. Forston*, this Court upheld Georgia's 5 percent signature requirement as to a "political body" or independent's ability to gain access to the ballot at the general election *vis-a-vis* the primary election nominee of a political party. The Court, after examining the *totality* of Georgia's laws in comparison with Ohio's, stated that:

"... Georgia's election laws, unlike Ohio's, do not operate to freeze the political status quo. In this setting we cannot say that Georgia's 5% petition requirement violates the Constitution." *Id.* at 438. (Emphasis added.)

Additionally, this Court held that:

"In a word, Georgia in no way freezes the status quo, but implicitly recognizes the fluidity of American political life. ..." *Id.* at 439.

See also *Raza Unida Party v. Bullock*, 349 F.Supp. 1272, 1279 (W.D.Tex. 1972, three-judge court), prob. jur. noted, *sub nom.*, *American Party of Texas v. Bullock*, 3/5/73, where the court stated:

"... Following the *Jenness* command to look to the '*totality*' of a state's requirements, and balancing Texas' burdensome organization requirements against its lenient 1% petition requirement, we hold that the organization requirements are constitutionally permissible." (Emphasis added.)

See also *Baird v. Davoren*, 346 F.Supp. 515, 519 (D.Mass. 1972, three-judge court), employing the "totality" approach.

This is exactly what the lower court did in the instant cases. It looked at California's laws in their totality. See Appendix, p. 88.

In California "qualified parties," that is, parties qualified to participate in primary elections, are provided for in section 6430.

Pursuant to section 6430 a party may attain the status of a qualified party in California if: (1) it polled at least 2 percent of the vote at the last gubernatorial election as to any statewide candidate, subdivision (a); or (2) if on the 135th day before the primary election it had registered with its party voters equal to 1 percent of the vote cast at the last gubernatorial election, subdivision (c); or (3) if on the 135th day before the primary election, it has filed a petition signed by voters equal in number to 10 percent of the votes cast at the last gubernatorial election, subdivision (d). (Subdivision (b) apparently was enacted to provide percentage requirements when cross-filing was permitted in California.) See *Christian Nationalist Party v. Jordan*, 49 Cal.2d 448; 318 P.2d 473 (1957), and *Socialist Party, U.S.A. v. Jordan*, 49 Cal.2d 864; 318 P.2d 479 (1957), cert. denied, 356 U.S. 952 (1957), upholding the constitutionality of the predecessor to section 6430.

Section 6430 has insured the fluidity of political life in California in the past and in recent years. In fact, in 1968, both the American Independent Party and the Peace and Freedom Party qualified for a place on the California ballot under the provisions of subdivision (c). Each had over 100,000 registered party members when they qualified. See Exhibit G to appellee's Points and Authorities filed August 18, 1972. These two minor parties were on the California ballot in 1972. Additionally, in past years California has also had such "third parties" on the ballot as the Prohibition Party, and the Independent-Progressive Party.³ The Democratic and Republican Parties thus have no monopoly on political life in California, nor have they

3. See, e.g., "State of California, Statement of Vote, General Election, November 4, 1952" compiled by Frank M. Jordan, Secretary of State, pp. 4-7. Though not a part of the record, this is subject to judicial notice.

had in the past. There is no freezing of the status quo in California. Obviously, under the literal terms of the liberal subdivision (c), *supra*, there could be 100 parties qualified for the ballot in California.

Additionally, California has a write-in procedure applicable to both primary and general elections. §§ 10213, 10228, 10292, 10317. To avoid the necessity for counting votes for persons written in in jest, the 1968 Legislature enacted sections 18600 through 18604 to provide that if a person desires to be a write-in candidate, he file a declaration to that effect and pay the filing fee. California also has write-in procedures for the presidential primary, sections 6260-6263, and presidential electors, section 10229.

Thus, the fluidity of political life in California is guaranteed by section 6430, *supra*, permitting new groups or parties to qualify for the ballot with a modicum of support, and also by providing the write-in process. As a *bonus*, the Legislature has also provided the Independent Nomination Procedure, which appellants solely attack here, to insure greater fluidity and to further insure that the status quo is not frozen.

II. States May in Their Election Laws Provide for (1) a Manageable Ballot (2) Party and Candidate Support (3) Protection of the Party System and (4) Electoral Support for the Winning Candidate

A. GUARDING AGAINST PROLIFERATION OF THE BALLOT IS A COMPELLING STATE INTEREST

"The Court has recognized that a State has a legitimate interest in regulating the number of candidates on the ballot. *Jenness v. Forsten*, 403 U.S. at 442; *Williams v. Rhodes*, 393 U.S., at 32 . . ." *Bullock v. Carter, supra*, 405 U.S. 134, 145 (1972).

This "legitimate interest" has been held to be a "compelling state interest." *Baird v. Davoren, supra*, 346 F.Supp.

515, 519, 521 (D.Mass 1972, three-judge court); *Bendinger v. Ogilvie*, 335 F.Supp. 572, 575 (N.D.Ill. 1971, three-judge court). Thus, attempts by appellants herein to try to de-grade such interest by describing it in terms of a "talis-manic incantation" are not justified. See appellants' brief, *Storer*, p. 23.

B. REQUIRING PARTY AND CANDIDATE SUPPORT IS A COMPELLING STATE INTEREST

Whether considered as a separate interest of the state, or whether considered as a facet of insuring a manageable ballot, there is no doubt that the state has an important interest in insuring party or candidate support. As stated in *Jenness v. Forston*, *supra*, 403 U.S. 431, 442 (1970):

"There is surely an important state interest in requiring some preliminary showing of a *significant* modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election. . . ." (Emphasis added.)

Such substantial modicum of support is also recognized as a compelling state interest. *Jackson v. Ogilvie*, 325 F.Supp. 864, 868 (N.D.Ill. 1971, three-judge court), *aff'd mem*, 403 U.S. 925 (1971). See also, *e.g.*, *Beller v. Kirk*, 328 F.Supp. 485 (S.D.Fla. 1970, three-judge court), *aff'd sub nom.*, *Beller v. Askew*, 403 U.S. 925 (1971).

C. PROTECTION OF THE PARTY SYSTEM IS A COMPELLING STATE INTEREST

Though the disaffected would probably not agree, there also is no doubt that protection of our party system, and the protection of the integrity of parties, is a legitimate and compelling state interest.

In holding a "24-month rule" constitutional as to party candidates, the court in *Bendinger v. Ogilvie*, *supra*, 335 F.Supp. 572 (N.D.Ill 1971, three-judge court) set forth perhaps the finest exposition of the party integrity concept, and the compelling state interest in the protection of the party system, and noted that "The keystone of our democracy is the party system of politics" and that "Without rules like the '24 month rule,' party swapping and changing might conceivably become so prevalent that the average political party could no longer function properly." *Id.* at 575. See also, *Tansley v. Grasso*, 315 F.Supp. 513, 517 (D. Conn. 1970).

Or as succinctly stated by the Supreme Court of Florida in *Crowells v. Petersen*, 118 So.2d 539-40 (Fla. 1960):

"... The requirement of two years registration within the party as a condition precedent to become a candidate of that party is, in our judgment, a reasonable regulation. It contributes directly to the maintenance of party loyalty and a perpetuation of the party system which the courts have universally held to be essential to the preservation and perpetuation of our political life."

In fact, this Court itself has recognized both by summary affirmance and otherwise the compelling state interest in protection of the party system and the integrity of parties. In *Lippitt v. Cipollone*, 337 F.Supp. 1405, 1406 (N.D. Ohio 1971, three-judge court), *aff'd mem.*, 404 U.S. 1032 (1972), the court, in upholding Ohio's law against party raiding held:

"The compelling State interest the Ohio Legislature seeks to protect by its contested statutes is the integrity of all political parties and memberships herein..."

See also *Williams v. Rhodes*, *supra*, 393 U.S. 23, 31-32 (1968), implicitly recognizing the importance of the party

system so long as two parties do not retain a permanent monopoly. Two parties, of course, have no monopoly in California.

D. INSURING ELECTORAL SUPPORT FOR THE WINNING CANDIDATE IS A COMPELLING STATE INTEREST

Finally, with regard to compelling state interests in general, a state also has a legitimate and compelling interest in attempting to insure that the winning candidate is the choice of a majority, or at least a large plurality, of the electorate. This interest might also be considered a facet of the interest in prevention of ballot proliferation. *Bullock v. Carter, supra*, 405 U.S. 134, 145 (1971); *Williams v. Rhodes, supra*, 393 U.S. 23, 32 (1968).

III. The Traditional Rational Basis Test Should Be Applied in Determining the Constitutionality of California's Independent Nomination Procedure

As has been explained above, the Independent Nomination Procedure is truly a legislative bonus. As far as both voters and candidates are concerned, if they do not wish to associate with the two major parties in California, or third parties which may be also currently qualified, section 6430 already permits them to freely "... associate, to proselytize, to speak, to write, and to organize campaigns for any school of thought they wish ... [or] [t]hey may confine themselves to an appeal for write-in votes. ..." *Jenness v. Forston, supra*, 403 U.S. 431, 438 (1971). Thus, even without the Independent Nomination Procedure, reasonable alternatives to the ballot are provided for groups and candidates with a significant modicum of support. Also the write-in process is available for candidates not desiring to partake in the forming of or joining new associational groups, or who have little or merely local backing.

There is no federal constitutional right to run for office as an independent. See *Jones v. Hare*, 440 F.2d 685 (C.A.6 1971), *cert. denied*, 404 U.S. 911 (1971), holding a claim to such right as so unsubstantial as not to need further argument.⁴ In view of this fact, and the fact that the fluidity of political life in California is assured even without independent nominations, the lack of the Independent Nomination Procedure would have, or its existence has, little impact on the voters. Therefore, under the Court's reasoning in *Bullock v. Carter*, *supra*, 405 U.S. 134, 142-43 (1972), the rational basis test would be applicable to California's Independent Nomination Procedure, instead of the more rigid close scrutiny test. As the Court reasoned in *Bullock v. Carter*:

"The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review. However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters. Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review. *McDonald v. Board of Election*, 394 U.S. 802 (1969). Texas does not place a condition on the exercise of the right to vote, nor does it quantitatively dilute votes that have been cast. Rather the Texas system creates barriers to candidate access to the primary ballot, thereby tending to limit the field of candidates from which voters might choose.

4. We note that *In re Terry*, 203 N.Y. 293, 96 N.E.931 (1911) and *Moore v. Walsh*, 286 N.Y. 552, 37 N.E.2d 555 (1941), cited at page 24 of appellants' brief for another point, hold there is a right in New York to be an independent nominee. These cases, however, are clearly based upon the New York Constitution.

The existence of such barriers do not of itself compel close scrutiny. Compare *Jenness v. Forston*, 403 U.S. 431 (1971), with *Williams v. Rhodes*, 393 U.S. 23 (1968). In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." (Footnotes omitted.)

Cf. Rosario v. Rockefeller, U.S. (1973), 41 L.W. 4401, March 21, 1973.

Since the disaffected may organize and associate pursuant to section 6430, and form new "parties" to advance their ideas, the impact of the Independent Nomination Procedure falls lightly upon the voters, and the rational basis test should apply when examining California's Independent Nomination Procedure.

IV. Assuming, *Arguendo*, That the Independent Nomination Procedure Must Be Examined in a Vacuum, it Is Valid Whether the Rational Basis Test or the Close Scrutiny Test Is Applied.

Assuming, *arguendo*, that California's Independent Nomination Procedure must be examined in a vacuum, contrary to the Court's "totality" approach in *Jenness v. Forston*, *supra*, 403 U.S. 431 (1971), it is valid whether the rational basis test or the close scrutiny test is applied. Each of its provisions are not only reasonably related to the achievement of legitimate state purposes, but are necessary to further compelling state interests.

5. Arguments that appellants want to have nothing to do with "political parties," and therefore should not be required to utilize section 6430, because they are "independents" are illusory. Independent of what? The major parties? Thought? Action? Do they exist in a vacuum so they can have no common grounds, thoughts or ideas for associational purposes? Logic commands that so long as voters may associate for common purposes, a state may require they be denominated a "party," even if they should want to call themselves "The Independent of Everything Party."

A. THE 5 PERCENT SIGNATURE REQUIREMENT IS VALID AS ARE OTHER SUBSTANTIAL SIGNATURE REQUIREMENTS

As pointed out in section II, B, *supra*, the requiring of substantial support for parties and candidates before they may be *printed* on the ballot promotes compelling state interests.

Section 6831 states that "Nomination papers shall be signed by voters of the area for which the candidate is to be nominated, not less in number than 5 percent . . . of the entire vote cast in the area at the preceding general election. . . ."

This Court upheld the 5 percent signature requirement for independent nominees in Georgia in *Jenness v. Forston*, *supra*, 403 U.S. 431 (1971). *Jackson v. Ogilvie*, *supra*, 325 F. Supp. 864 (N.D.Ill. 1971, three-judge court), *aff'd mem.*, 403 U.S. 925 (1971), also upheld such a 5 percent requirement. Other courts have upheld substantial signature requirements for independents or new parties. See, *e.g.*, *Baird v. Davoren*, *supra*, 346 F.Supp. 515 (D.Mass. 1972, three-judge court), 3 percent requirement; *Beller v. Kirk*, *supra*, 328 F.Supp. 485 (S.D.Fla. 1970, three-judge court), *aff'd sub nom.*, *Beller v. Askew*, 403 U.S. 925 (1971), 3 percent requirement; *People's Constitutional Party v. Evans*, 491 P.2d 520 (N.M. 1971), 3 percent requirement; *Beller v. Adams*, 235 So.2d 502 (Fla.1970), 5 percent requirement.

"There is surely an important state interest in requiring some preliminary showing of a *significant* modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election. . . ." (Emphasis added.)

Jenness v. Forston, *supra*, 403 U.S. 431, 442, (1971), *re* the 5 percent requirement as to minor parties and independent candidates.

Despite these holdings, appellants asked for ballot position at the general election without the requisite *significant* modicum of support. Messrs. Storer and Frommhagen requested they have their names printed on the ballot with only 40 signatures. Messrs. Hall's and Tyner's position was analogous on the statewide level. Their requests border upon the ludicrous. See §§ 6080, 6082 and 6495.

The argument advanced by appellants that California's 5 percent requirement is in reality a 25 percent requirement is both illusory and, we feel, incorrect. It is premised upon two things: (1) That 70 percent of the electorate are removed from the pool of electors who may sign petitions because (2) persons who voted either a partisan or non-partisan ballot at the primary election may not sign such petitions.

The argument is illusory for the simple reason that, a vast portion of the electorate is already automatically removed from the pool of individuals who would sign independent nomination petitions by reason of party affiliation or loyalty. Therefore, in any state it could be argued that a 3 percent requirement is in reality a 15 percent requirement, or that a 5 percent requirement is in reality a 25 percent requirement. In short, the significant modicum of support will almost always be found in a "residual group."

Secondly, the argument is incorrect in that it presupposes the obvious erroneous position that 70 percent of the electorate who are registered for the general election (1) were also registered for the primary election [they need not have been] and (2) they also voted at the primary election. In 1972 there was a statewide increase in registration between the primary and general elections of 1,360,928

voters which added to the potential pool of signatories for independent nominees.⁶

In fact, we demonstrated below in *Storer* and *Fromm-hagen* (and assuming the nonpartisan who voted at the primary election may sign⁷) that the potential pool of signatories in the congressional districts involved herein was closer to 50 percent of the electorate than the 30 percent claimed by appellants. See appellee's Points and Authorities filed August 18, 1972, pp. 16-17 and Exhibits D, E and F thereto.⁸

B. SECTION 6830(c), INSOFAR AS IT REQUIRES SIGNATORIES WHO DID NOT VOTE AT A PRECEDING PRIMARY, IS VALID

Section 6830(c) requires that independent nomination papers contain "... [a] statement that ... each signer ... did not vote at the immediately preceding primary election at which a candidate was nominated for the office. ..."

This type of restriction has been upheld numerous times by courts in recent years, and even summarily affirmed by this Court or dismissed for want of a substantial federal question.

In *Moskowitz v. Power, et al.*, 25 N.Y. 2d 933, 305 N.Y. Supp.2d 150 (1969), appeal dismissed, 396 U.S. 373 (1970):

6. Reports of Registration, State of California, May 1972 and October 1972, pp. 111 and 106 respectively. These are not part of the record but are subject to judicial notice.

7. This point will be developed further *infra*, and may affect one of the assumptions appellants use to predicate their "70% removal" argument, that is, that persons who voted nonpartisan ballots at the primary election may not sign independent nomination petitions.

8. We note that in *People ex rel Hotchkiss v. Smith*, 206 N.Y. 231, 99 N.E. 568 (1912), cited by appellants for another point, the court invalidated the signature requirements of the then New York independent nomination law. However, it reinstated prior *valid* law, which in Hamlin County could have still required one-third of the voters to sign a petition.

"The nominating petition required a minimum of 5,000 signatures. It contained 6,534 signatures. The Board of Elections however invalidated 3,043 signatures. Of those invalidated 1,392 were those of persons who had voted in the 1969 primary election and 1,393 were those of persons who had not registered.

"Moskowitz contended that the requirement of Election Law § 138, subd. 5, par. (c) that nominating petition for the office have 5,000 signatures when only 2,500 signatures were required on a designating petition by Election Law § 136, subd. 2, par. (c) was unconstitutional because discriminatory, and that statutory provision that name of person signing an independent nominating petition shall not be counted if that person voted at the primary election, Election Law, § 138, subd. 6, was an unconstitutional invasion of right to vote." 305 N.Y.Supp.2d at 150.

The New York Court of Appeals affirmed the decision of the lower court denying Moskowitz candidate status. See 33 App.Div.2d 562, 305 N.Y.Supp.2d 762 (1969). This Court dismissed for want of a substantial federal question.

In *Socialist Workers Party v. Rockefeller*, 314 F.Supp. 984 (S.D. N.Y. 1970, three-judge court), *aff'd mem.*, 400 U.S. 806 (1970), against an attack by minor parties on New York election laws similar to the attack herein, the court upheld the validity of the New York provision against voting both at the primary and *thereafter* signing an independent nomination petition, reasoning in part:

"On the other hand, that portion of Section 138 which discounts the signature of a voter who has voted at a primary election where a candidate was nominated for an office for which the nominating petition purports to nominate another candidate, can be justified by the compelling State interest to preserve inviolate the sanctity and secrecy of the ballot. Since the State cannot determine which candidate a particular voter

selects in the primary or whether he has in fact selected only some of the proffered candidates, this provision can be justified under the present teachings of the Supreme Court. . . ." *Id.* at 993.

In *Jackson v. Ogilvie*, *supra*, 325 F.Supp. 864 (N.D. Ill. 1971, three-judge court), *aff'd mem.*, 403 U.S. 925 (1971), the court stated as to restrictions as to signatories:

"Plaintiff Jackson also challenges § 10-4 of the Illinois Election Code on the ground that this provision restricts the availability of potential signatories. As we noted above § 10-4 does not prevent any qualified signatories from signing a nominating petition for Jackson. The statutory scheme of the State of Illinois establishes and secures by statute the mandate of *Baker v. Carr*, *supra*, and its progeny. *Baker* requires that one elector must have one vote. Under the Illinois Election Code an elector is offered an option. He may sign a petition for an independent candidate. If he signs such a petition he is not qualified to vote in a primary election for a candidate seeking the same office as the independent who he supports. 46 Ill.Rev. Stat. § 7-43(c). Further, were it possible for a primary election to occur prior to the date for filing nominating petitions, then voting in a primary would prevent an elector from supporting an independent. Thus, the state's scheme attempts to insure that each qualified elector may in fact exercise the political franchise. He may exercise it either by vote or by signing a nominating petition. He cannot have it both ways. Such a requirement seems not only fair but mandatory under the holding in *Baker v. Carr*, *supra*." *Id.* at 867.

Finally, in *Stout v. Black*, 8 Ill.App.3d 167, 289 N.E.2d 456 (1972), the court sustained the constitutionality of the law requiring rejection of signatories on a congressional independent nominee's petition who had already voted at

the congressional primary on the authority of *Jackson v. Ogilvie*, reasoning:

"... we do think it a constitutional means of protecting the integrity of the election process. As noted in *Jackson*, the Illinois Election Code offers the elector an option. In addition to the Section 10-4 restriction on signing nominating petitions after voting in a primary, Section 7-43(c) provides that one signing the petition of an independent cannot later vote in a primary at which candidates for the same office are being selected. This provision has been held constitutional on the basis that the nominating process in Illinois would be endangered by allowing non-party members to participate in a party primary. *Rouse v. Thompson* (1907), 228 Ill. 522, 547-548, 81 N.E. 1109. This reasoning is equally applicable here. The danger of a non-party member attempting to subvert the party's best candidate while at the same time putting his desired candidate on the ballot exists regardless of whether the primary comes before or after the signing of the petition. *Allowing a person to take part in nominating two people for the same office in the same election can only lead to fraud and the destruction of party organization.* See *Katz v. Fitzgerald* (1907), 152 Cal. 433, 93 P. 112.

"The fact that Section 10-4 has the effect of disallowing signatures of some people who did not actually vote for a candidate for the particular office in the primary, or whose candidate did not win the nomination, does not render the statute unconstitutional. *Since a primary is conducted by closed ballot, no statute could be drawn more narrowly.*" (Emphasis added.) 289 N.E.2d at 456.

Thus, there is no doubt that provisions such as 6830(c) are valid. This being so, appellants' claim that such a provision is unconstitutional in that it requires a person to

give up one right, the right to vote, in order to exercise another fundamental right is completely without merit. As noted by the court in *Socialist Workers Party v. Rockefeller, supra*, 314 F.Supp. 984, 993 (S.D.N.Y.1970, three-judge court), *aff'd mem*, 400 U.S. 806 (1970) “. . . [t]he purpose . . . is to limit each voter to but a single choice for office. . . .”

The fact that there is no doubt that a restriction as to signatories such as 6430(c) is valid nullifies other contentions raised by appellants. Obviously, *Jackson v. Ogilvie* did not, as appellants claim, consider it necessary to construe the independent nomination procedure so as to avoid the possibility that independent nomination papers could only be circulated after a primary election. A careful reading of *Jackson v. Ogilvie* will demonstrate that the construction avoided was the inability to sign a petition for having voted at a *completely different* prior mayoralty race. See 325 F.Supp. at 866-67. *Moore v. Board of Elections For District of Columbia*, 319 F.Supp. 437 (D.D.C.1970), is inapposite in this regard in that it construed the law of the District of Columbia to permit an individual to *sign* both a primary nominating petition, and an independent nominating petition. It construed laws not even similar to section 6430(c). Appellants Storer and Hall were prejudiced very little because they did not have access to the 40 voters who at the primary election sponsored each of their would-be opponents.

Finally, with regard to appellants' contentions, the cases sustaining statutes such as 6830(c) also implicitly recognize that where the primary precedes the circulation of an independent nomination petition, a certain number of the voters will necessarily be removed from the potential pool of signatories. (See IV, A, *supra*.)

It is to be noted that the court below apparently construed section 6830(c) so as not to make a distinction between persons who voted a nonpartisan ballot and those who voted a partisan ballot at the primary election. Appendix, p. 86. If, however, this Court should feel that such a literal interpretation of section 6830(c) was improper, we point out and renew the argument we made below that the disqualification as to signing a petition is not applicable to independents, or members of unqualified parties who voted only a nonpartisan office ballot and on measures.⁹ See appellee's Points and Authorities filed August 18, 1972, pp. 10, 13.

It was appellee Secretary of State's position below that section 6830(c) means that that signers of an independent nomination petition cannot have voted a partisan primary ballot. In California, each qualified party has a separate ballot. There is also a nonpartisan ballot. § 10290 *et seq.*, § 14406. Essentially, there is a primary election for each qualified party (in 1972, the Democrats, Republicans, American Independent Party Members and Peace and Freedom Party Members), and the nonpartisans (or "declines to state" as the plaintiffs) hold a nonpartisan primary.

"... What we call 'the primary election' is really a number of primary elections equal to the number of parties participating, but conducted at the same time and at the same polling-places by one set of public officers...." See *Schostag v. Cator*, 151 Cal. 600, 603-04, 91 Pac. 502, 503 (1907).

Therefore, it was the Secretary of State's position that if voters did not vote at a "partisan primary," but only the

9. This reasoning would equally apply to the court's construction of section 6830(c) as to disqualification for independent candidacy for having voted on nonpartisan matters at the June 1972 primary election, to be discussed *infra*.

nonpartisan ballot, they were not excluded from signing an independent nomination petition.

C. INsofar AS SECTION 6830(c) MAY HAVE PREVENTED APPELLANTS FROM BEING CANDIDATES, SUCH WAS PROPER TO INSURE PARTY INTEGRITY. THE SAME PRINCIPLES ARE APPLICABLE TO SECTION 6830(d)

As pointed out initially, California's election laws present a reasoned intermeshing of primary and general election laws. Section 6830(c),¹⁰ insofar as it prevents candidates for independent nomination, as well as their signatories, from having voted in the primary election, is part and parcel of a group of statutes which insure party integrity and thus the preservation of our party system. It must be read in context as a part of the entire group of such statutes. The same reasoning applies to section 6830(d).

Section 6401 of the primary law requires a party nominee to have been affiliated with his party for three months prior to filing his nomination papers, and with no other *qualified party* for one year. The corollary provision is section 6830(d) requiring that an independent nominee also not have been registered with a qualified party for one year immediately preceding the primary election.

Section 6402(a) of the primary law, and section 6801 of the Independent Nomination Procedure both prohibit a candidate who was defeated in a partisan primary from being an independent candidate.

Section 6611 of the primary law prohibits a candidate who fails to receive his own party's nomination from being the candidate of any other political party.

And as already discussed in the previous section, section 6430(c) prevents persons who have voted in a primary from

10. See note 9, *supra* re the position of the Secretary of State below as to the interpretation of this section as to independents who vote a nonpartisan primary ballot.

being signatories for independent candidates at the general election.

These sections in their totality achieve not only the compelling State interest against "party hopping" but also prevent "party splintering," an obvious compelling interest of the State. In short, in their totality, these sections serve the compelling State interests of insuring that the party system does not disintegrate.

These sections also comport with California Constitutional provisions and federal law. Article II, section 4 of the California Constitution, as added in November 1972, provides that "The Legislature shall provide for primary elections for partisan offices. . . ."¹¹ States, of course, "... have broad discretion in formulating election policies. . . ." *Tansley v. Grasso*, *supra*, 315 F.Supp.513, 519 (D.Conn. 1969, three-judge court), citing *inter alia*, *Williams v. Rhodes*, *supra*, 393 U.S. 23, 34 (1968) and *United States v. Classic*, 313 U.S. 299, 311 (1941). Protection of the party system and party integrity are compelling state interests, as demonstrated in II, C, *supra*.

In fact, section 6401 of the primary law, *supra*, prohibiting a partisan primary candidate from having been a member of another party for 12 months and to have been affiliated with his own party for at least three months was held to be constitutional by the California Supreme Court as recently as 1968 in *Peace and Freedom Party. etc., et al.*

11. At the same time article II, section 2.5 was repealed, which provided in part that "... the Legislature shall enact laws providing for the direct nomination of candidates for public office, by electors, political parties, or organizations of electors without conventions, at elections to be known and designated as primary elections; also to determine the tests and conditions upon which electors, political parties, or organizations of electors may participate in any such primary election. . . ." The laws herein discussed were adopted before the "streamlining" of these provisions.

v. Jordan, as Secretary of State, et al., Sac. No. 7821. In such case the Peace and Freedom Party sought a judgment in the California Supreme Court declaring the 12-month and 3-month provisions of section 6401 unconstitutional on its face or as applied to them, in an attempt to broaden their base for candidates. By minute order, the California Supreme Court held section 6401 constitutional as follows:

"Sac. 7821. *Peace and Freedom Party, etc., et al. v. Jordan, as Secretary of State, et al.* Petition denied. The relief requested is precluded by Section 6401 of the Elections Code, which is constitutional. This order is final forthwith. Justices Tobriner and Mosk are of the opinion that Elections Code Section 6401, while constitutional, was not intended to apply to persons in the positions of these petitioners."

See also, *Socialist Party v. Uhl*, 155 Cal.776, 792-94, 103 Pac. 181, 188-89 (1909), wherein the California Supreme Court, in upholding the *then* direct primary law, stated the party integrity concept in as relevant a manner as it could be stated today. See also, *Communist Party v. Peek*, 20 Cal.2d 536, 544-45, 127 P.2d 889, 894-95 (1942).

Of particular significance are the cases of *Bendinger v. Ogilvie*, *supra*, 335 F.Supp.572 (N.D.Ill.1971, three-judge court) and *Crowells v. Petersen*, *supra*, 118 So.2d 539, 540 (Fla.1960), both upholding "24-month rules" for party candidacy and *Lippitt v. Cipollone*, *supra*, 337 F.Supp. 1405 (N.D. Ohio, 1971, three-judge court), *aff'd mem.*, 404 U.S. 1032 (1972), upholding Ohio's 4-year rule as to party candidacy. Each of these cases sustained these restrictions as to candidacy in the interest of party integrity. If a state may require party membership for two years to insure party loyalty (*Crowells v. Petersen*), or deny party candidacy to those who were loyal to other parties within either two years (*Bendinger v. Ogilvie*) or four years (*Lip-*

pitt v. Cipollone) in the interest of party integrity, by a parity of reasoning California can require nonparty membership or deny independent candidacy to prior party members for a year or so to insure *true independent* status. By insuring true independent status the state is furthering the compelling state interest of preserving party integrity by preventing the splintering of political parties after a primary election. Such splintering could lead to the disintegration of the party system which is "... essential to the preservation and perpetuation of our political life." *Crowells v. Petersen, supra*, 118 So.2d 539, 540 (Fla. 1960).

The section 6830(d) restriction as to independent candidacy if the individual has been affiliated with a qualified party for one year prior to the primary election is not, as urged by appellants, a "purification period." Rather, it is merely a period of time sufficient to impose objective criteria as to true independent status. It thus insures objectively that an individual running as an independent candidate is not, in reality, attempting to splinter his party. A more narrowly drawn statute could not impose objective criteria.

Thus, sections 6830(d) and 6830(c), insofar as they prohibit an individual from being an independent candidate, further compelling state interests through statutes which are not overly broad.¹²

12. These provisions in effect overlap, assuming that section 6830(c) means that an independent candidate may not have voted at a *partisan* primary. This is because section 6830(d) was added in 1969 rounding out the "party integrity" statutes. See Cal.Stats. 1969, ch.948, p. 1894. Without qualified party affiliation, he could not have voted at a partisan primary. Section 6830(c), as to candidates, and standing alone, still promotes the compelling state interest of not being able to "... have it both ways." *Jackson v. Ogilvie, supra*, 325 F.Supp. 864 (N.D.Ill.1971, three-judge court), *aff'd mem.*, 403 U.S. 925 (1971).

Nagler v. Stiles, 343 F.Supp.415, (D.N.J.1972, three-judge court), *Yale v. Curvin*, 345 F.Supp.447 (D.R.I. 1972, three-judge court) and *Gordon v. Executive Committee of Democratic Party*, 335 F.Supp.166 (D.S.C. 1971, three-judge court) relied on by appellants are inapposite because they involved durational party requirements as to voters, not as to candidates. Compare, however, *Rosario v. Rockefeller, supra*, U.S. (1973), 41 L.W. 4401, March 21, 1973. In fact the distinction between regulation of candidates and voters, permitting more stringent regulations upon candidates, was noted in another case cited by appellants for another point in their brief. See *Pontikes v. Kusper*, 345 F.Supp. 1104, 1108-1109 (N.D.Ill.1972, three-judge court) prob. jur. noted 4/2/73, striking down Illinois' "party-raiding" statute. Additionally, we are not involved with "party raiding" in the sense used in the foregoing cases, but in possible party splintering and disintegration of the party system. Therefore, it would appear that appellants need not labor further in their attempt to understand what they have termed "... the conceptually difficult notion that one raids a political party when he leaves it. . . ." *Storer* brief, page 31. Neither the Secretary of State nor the court below has advanced such "notion" in the context that "party raiding" has been used in prior case law.

D. THE TWENTY-FOUR DAY REQUIREMENT FOR OBTAINING SIGNATURES SUSTAINS THE COMPELLING STATE INTEREST OF PERMITTING VOTERS TO DECIDE WHETHER THEY SHOULD SUPPORT INDEPENDENTS

Under the provisions of section 6833 in 1972 independent nomination papers were required to have been circulated between August 15 and September 8 for the November 7 general election.

"... Obviously some time limit is required as a practical matter to assure that only qualified signa-

tures are obtained and that the petitions reflect current attitudes of voters . . ." (Emphasis added.)

Moore v. Board of Elections for District of Columbia, supra, 319 F.Supp. 437, 440-41 (D.D.C. 1970, three-judge court), upholding 54 day circulation requirement. See also *Raza Unida Party v. Bullock*, supra, 349 F.Supp.1272, 1280-1281 (W.D. Tex. 1972, three-judge court), prob. jur. noted sub. nom. *American Party of Texas v. Bullock*, 3/5/73.¹³

The party nominees are not certified by the Secretary of State until after his official canvass, and the filing of campaign statements by candidates. Under the timing of the California Elections Code this last year (the dates will vary depending upon the primary date), the last date for filing the official canvass of the vote was July 15, 1972. California Government Code §§ 3750-3754; Elections Code §§ 11563-11565, 18471 and 6619.

Thereafter, and dependent upon the final determination of the nominees to ascertain the delegates thereto, state conventions are held in August at which party platforms are formulated. See generally §§ 8000, 8511, 8570, 8602, 9010, 9011, 9075, 9102, 9600 and 9601.¹⁴

13. *People's Party v. Tucker*, 347 F.Supp. 1 (M.D.Pa. 1972, three-judge court), relied upon by appellants fails to give proper recognition to the fact that the Communist Party met the 24-day requirement, and also fails to follow the *totality* approach of *Jennness v. Forston*. See dissenting opinion, *Id.* at 6, n. 5, 6-7.

14. For example, as to the Democratic Party, section 8570 requires the state convention to be held on a Saturday in August after each primary, to be designated by the party. As to the Republican Party, section 9075 requires their state convention to be held on the first Saturday in August after the primary. "Third Parties" are governed by the same rules as the Democratic Party. § 9601. The party platforms are adopted not later than the next day. §§ 8602 and 9102. The convention consists of holdover state and federal officers, nominees, and persons chosen to fill any vacancies. §§ 8511 and 9011.

It is certainly compelling that the candidates be officially designated and party platforms announced before voters decide whether to support existing party candidates or individuals desiring to run as independents. In California, as in Washington, D.C..

"... There is no restriction as to when a candidate, whether he stands in a primary or as an independent in the general election, may declare his candidacy and no time restriction on political activity. Indeed any candidate may solicit promises of signatures for his petition well before the permissible date for obtaining actual signatures."

Moore v. Board of Elections for District of Columbia, supra, 319 F.Supp. 437, 438 (D.D.C. 1970, three-judge court).

The time after September 8, 1972 was required for checking signatures and preparing for the election. It is to be emphasized that in California, absentee voting starts 29 days before the date of the general election. All candidates must be determined and ballots ready for such purpose by that time. In 1972, such date was October 10, 1972, § 14620 *et seq.*

With the interests to be protected by the 24-day period, a longer period of time within which to circulate nomination papers would not be possible.

V. California Elections Code, Sections 6830(c) and 6830(d) Do Not Impose an Additional Qualification for the Office of Congressman, But Are Legitimate State Regulations Pursuant to Article I, Section 4 of the United States Constitution

The court below correctly pointed out that "Legislatures of the respective states have broad powers granted by Article I, Section 4 [of the United States Constitution] ... to regulate the conduct of elections ... for ... Representatives..." Appendix, p. 89.

Appellants spend almost one-third of their brief in *Storer* (pp. 38-56) arguing that the sole qualifications for Congress are those set by article I, section 2, clause 2 of the United States Constitution. Appellee Secretary of State has no particular reason to dispute this contention as a general proposition since it is his position that section 6830(c) and 6830(d) do not add an additional qualification for the office of Representative in Congress.¹⁵

Section 6830(c) and 6830(d) merely impose upon independent candidates a regulation as to running for office. If they voted at the preceding primary,¹⁶ or if they have elected to leave a qualified party within one year of the primary election, they merely may not run for office, including that of Representative in Congress, as an independent. However, if they are affiliated with a qualified party they may run for Congress. Also even if they may not be an independent nominee, they may still be a write-in candidate. There are three routes to candidacy. Choosing a course of action which closes one of three alternatives cannot be considered having added an additional qualification to the office of United States Representative. Candidacy is available. The choice is the individual's.

This is explained quite well in the case of *Roberts v. Cleveland*, 48 N.M. 226, 149 P.2d 120 (1944). In such case, which is very analogous to our situation, the Supreme Court of New Mexico held that a statute prohibiting a

15. We do, however, dispute appellants' statement at note 33, page 56 of their brief that *MacDougall v. Green*, 335 U.S. 281 (1948), found the requirement of signature gathering for statewide office nonjusticiable. See *Moore v. Ogilvie*, 394 U.S. 814, 816-17 (1968), explaining the substantive holding of the majority of the court.

16. The same considerations are applicable herein as to whether having voted at the preceding primary election includes having voted a nonpartisan ballot. See text at note 9, *supra*.

person from nomination to any office who had changed his party affiliation within 12 months of the Governor's election proclamation did not constitute a qualification for election to the office of Representative in Congress. The following language of the court is instructive, 149 P.2d at 122:

"... The right to be a candidate at the general election by the 'write in' method is provided for. He may be such candidate, independently of all parties; or, if he affiliates with any political party he may have his name upon the ballot at the general election as the candidate of that party provided he comes within the regulations and restrictions provided in the Primary Election Law...."

This same distinction between an election regulation and a qualification for federal office was applied by the court in Nebraska.

In *State v. Swanson*, 128 Neb. 21, 257 N.W. 255 (1934), the Supreme Court of Nebraska pointed out this distinction with regard to a similar contention regarding a gubernatorial candidate defeated at the primary who wished to be a U.S. Senate candidate by petition at the general election. The court held at 257 N.W. at 255-56:

"... The issue here is whether the relator is entitled to have his name printed on the ballot as a candidate nominated by petition, regardless of the Driscoll decision, because the office relator seeks is a federal office rather than a state office. The question is not whether he may be a candidate, but whether he may be nominated by petition and have his name printed on the ballot at the state's expense. *He may be a candidate and if electors write his name on the ballot in sufficient numbers he will be elected.*

• • •

"The Legislature considered it an evil for one who had unsuccessfully submitted his candidacy at the

primary to be allowed to be nominated later as a candidate for the same or for another office, and again to be permitted to have his name printed upon official ballots at the expense of the public.

"Relator has all the qualifications for office of Senator. The state statute in no manner seeks to add other qualifications. It does not prevent him from being a candidate. It is not unconstitutional, as clearly appears from the decision of the Supreme Court of the United States.

"The refusal of the secretary of state to accept the nominating petition and relator's acceptance thereof is fully justified. The writ is therefore denied." (Emphasis added.)

Thus, so long as an individual remains capable of being chosen for office, as was the case with Messrs. Storer and Frommshagen herein, the United States Constitution is in no way violated, since California's laws go to the manner of holding elections. *Cf. State ex rel Davis v. Adams*, 238 So.2d 415 (Fla.1970); *Secretary of State v. McGucken*, 244 Md. 70, 222 A.2d 693 (1966).

All the cases relied upon by appellants in their brief involved state laws which imposed an *absolute* disqualification as to candidacy. In fact, a number of the cases relied upon by appellants either cited, explained or distinguished *State v. Swanson*, *supra*, 128 Neb. 21, 257 N.W.255 (1934). These are *Shubb v. Simpson*, 196 Md.177, 76 A.2d 332, 341 (1950), appeal dismissed as moot, 340 U.S. 881 (1950); *State v. Crane*, 65 Wyo. 189, 197 P.2d 864, 870-71 (1948); *State v. Thorson*, 72 N.D.246, 6 N.W. 2d 89, 91 (1942), and the recent federal case, *Stack v. Adams*, 315 F.Supp. 1295, 1298 (N.D. Fla.1970, three-judge court). As explained in this latter case:

"The act, in essence, provides that a state public office holder who has not resigned his state office in

accordance with the Act cannot be a candidate for or be elected to Congress—it is a flat disqualification. Plaintiff, who has not resigned his office, even though he meets all of the qualifications prescribed by the United States Constitution, is, under the Florida act, disqualified to run because he is a state office holder of Florida, and has not resigned his position.

“Even State ex rel. O’Sullivan v. Swanson, 127 Neb. 806, 257 N.W. 255 (1934), does not, in principle, depart from the holding of the other state cases. In *O’Sullivan*, the court pointed out that a person seeking to file in the next general election contrary to its statute might still run for the federal office and be elected on the write-in ballot, although he could not have his name placed upon the ballot at state expense. Such might have been a strong practical deterrent to election, *but nonetheless, he could run. . .*” (Emphasis added.)

Thus, sections 6830(c) and 6830(d) do not impose an additional qualification for office, but constitute merely regulating the manner of holding elections for Congress as permitted by the United States Constitution, article I, section 4, clause 1.

VI. California's Write-in Process Presents an Additional Alternative to Satisfy the Constitutional Rights of Appellants to Participate in the Election Process

As was pointed out at the outset of the argument herein, in I, *supra*, California insures the fluidity of political life in California through numerous alternative means to the ballot. One of these is the write-in procedure applicable to both primary and general elections. §§ 6260-6263, 10229 and §§ 10213, 10228, 10292, 10317 and §§ 18600-18604.

Also, as heretofore pointed out, section 6430 already protects the rights of individuals and potential candidates who are dissatisfied with the current “qualified parties” in

California to associate, organize, and campaign for new schools of thought. Thus, even absent the Independent Nomination Procedure, the write-in process in California satisfies whatever residual rights appellants may have to participate in California's electoral process. *Jenness v. Forston*, *supra*, 403 U.S. 431, 438 (1971).

Cases both before and after *Williams v. Rhodes*, *supra*, 393 U.S. 23 (1968), point out the necessity and efficacy of the write-in process in satisfying constitutional rights to run for office. The efficacy of the write-in process has, in fact, been recently recognized by this Court in its summary affirmance of a case arising in Florida. In *Beller v. Kirk*, *supra*, 328 F.Supp.485, (S.D. Fla.1970, three-judge court), *aff'd sub nom.*, *Beller v. Askew*, 403 U.S. 925 (1971), where the court upheld Florida's three percent signature requirement for new parties, the court also held:

"The State has the right and duty to establish reasonable regulations for the conduct of elections for state offices. *There is no constitutional right to have one's name printed on the ballot. . . .*" (Emphasis added.) *Id.* at 486.

The court further stated:

". . . While not having one's name printed on the ballot may put him to some disadvantage in relation to one whose name does appear on the ballot, this does not constitute invidious discrimination, nor is it unconstitutional. *Ibid.*

In a recent New Jersey case, the Third Circuit Court of Appeals upheld the constitutionality of a restriction against a candidate who was defeated at the primary election from filing as an independent candidate in the general election. In such case, *Mammon v. Schatzman*, 472 F.2d 114, 115 (C.A.3 1972), the court noted as to such "independent's" supporters:

"The appellants other than Mammon contend that the statutory restrictions which preclude Mammon's name from appearing on the November ballot are unreasonably in derogation of their right to vote for him, the candidate of their choice. *But, they have a right under the New Jersey statute to cast 'write in' votes for him.* Moreover, once it is concluded that Mammon is not constitutionally aggrieved by his inability to have his name appear on the ballot, we see no rational basis for conferring upon his would be supporters a constitutional right to find his name there." (Emphasis added.)

In *Shankey v. Staisey*, 436 Pa. 65, 257 A.2d 897, 899, (1969), *cert.denied*, 396 U.S. 1038 (1970), the court stated:

"... By providing for write-in vote, the Elections Code gives every elector the right to vote for whomever he chooses. The right of a candidate to have his name on the ballot is not such an absolute one, however, because there is a competing interest at stake—the avoidance of an unduly complicated ballot which may confuse the voter and make impossible the use of voting machines...."

See also, *e.g.*, *Sullivan v. Grasso*, 292 F.Supp.411, 412 (D. Conn.1968, three-judge court); *Socialist Labor Party v. Rhodes*, 290 F.Supp. 983 (S.D.Ohio, 1968, three-judge court), modified, 393 U.S. 23, 35 (1968); *Spreckles v. Graham*, 194 Cal.516, 533-34; 228 Pac. 1040, 1046 (1924).¹⁷

17. Compare, however, *Williams v. Rhodes*, *supra*, 393 U.S. 23, 37 (1968), concurring opinion of Mr. Justice Douglas. Compare also cases such as the following, cited by appellants Storer and Hall in their opening brief for other points: *Manson v. Edwards*, 345 F.Supp. 719 (S.D.Mich.1972); *Jenness v. Little*, 306 F.Supp. 925 (N.D.Ga.1969, three-judge court), appeal dismissed as moot, 397 U.S.94 (1970); *Ragan v. Junkin*, 85 Neb. 1, 122 N.W. 473 (1909), and *Holliday v. O'Leary*, 43 Mont. 157, 115 P.204, (1911). *Manson v. Edwards*, *supra*, involved an age requirement. An under age write-in candidate could never have been elected. *Jenness*

Thus, there is no constitutional right to have one's name printed on the ballot, nor is there a constitutional right for supporters of a candidate to find his name printed there. In response to the usual argument that the write-in process is meaningless, the following is pointed out, and was pointed out to the court below. In the 1972 primary election an incumbent Democratic Congressman won the nomination of the Republican Party through the write-in process, as well as that of his own party through the conventional printed ballot. Admittedly, there was no declared Republican opposition. The significant fact, however, is that over 5,000 write-in votes were cast for various write-in candidates for the Republican congressional nomination in such district. See Exhibit H to appellee's Points and Authorities filed August 18, 1972.

Thus, the write-in process, at least in California, is not illusory. Voters can and will use it when there is the requisite motivation to do so.

VII. California's Independent Nomination Procedure in No Way Invidiously Discriminates in Favor of Established Political Parties. It is an Additional Alternative for New Groups and Candidates to Qualify for Ballot Space

Appellants take umbrage with the fact that pursuant to section 6430 subdivision (a) a party remains a "qualified party" if it polled at least 2 percent of the *statewide vote* at the last gubernatorial election, whereas independents must obtain signatures of 5 percent of the vote cast *in the area* at the preceding general election. The underscored language demonstrates right away that appellants are

v. Little, supra, was a filing fee case. Therefore, a candidate has no other alternative means to the ballot. *Ragan v. Junkin, supra*, was decided upon the State Constitution and also involved a situation without reasonable alternatives. *Holliday v. O'Leary, supra*, also involved no alternative means to the ballot.

attempting to equate two different concepts—one a statewide vote for party qualifications, the other an area vote for candidacy for a single office.

This is brought into relief when one considers appellants Hall and Tyner, who are members of the Communist Party. They, of course, could not qualify pursuant to subdivision (a) of section 6430, since they are not members of a qualified party. However, their party, and persons who espouse the beliefs of the party, still had and have the options of satisfying subdivision (c), the 1 percent registration provision, or subdivision (d), the 10 percent signature provision. As has been pointed out, in 1968 both the American Independent Party and the Peace and Freedom Party qualified under the liberal provisions of subdivision (c) of section 6430.¹⁸ Unable to meet these liberal registration requirements, the Communist Party apparently decided to run their candidates Hall and Tyner as "independents." They, however, cannot claim invidious discrimination. Their constitutional right to ballot space was already protected by section 6430. It cannot be said that 2 percent of the vote is less burdensome than a 1 percent registration requirement.¹⁹ Cf. *Jenness v. Forston*, *supra*, 403 U.S. 431, 440-41 (1970). Consequently, the Independent Nomination Procedure, which they attempted to utilize, presented an additional alternative for the party, a *legislative bonus*.

18. Interestingly, in *Williams v. Rhodes*, *supra*, 393 U.S. 23, 47, n.7 (1968), concerning opinion of Mr. Justice Harlan, California was apparently grouped with the overwhelming majority of states which had a 1 percent or fewer "signature requirement."

19. The 1/15th of one percent requirement of section 6430 is an *additional* test for already qualified parties to meet. Such an additional test or burden was not even found in Georgia as to parties, which qualified by a percentage of the prior vote. In Georgia, affiliation could be zero, and the party would still be qualified.

Likewise, any person or group wishing to espouse thoughts *on a statewide basis* may qualify for ballot space under the provisions of section 6430 even if they consider themselves "independents."²⁰ Therefore, they also cannot claim "invidious discrimination" from the provisions of the Independent Nomination Procedure, an additional alternative for new groups and the espousal of new ideas.

Therefore, this leaves only the claim of invidious discrimination by the *local* candidate for a "local office."

The local candidate, such as Messrs. Storer and Fromm-hagen, without a statewide base or aspirations, would utilize the Independent Nomination Procedure to run for local *partisan* office, such as Congress or State Senate or Assembly. Thus, the procedure is basically a means for "nonpartisans" to run for partisan office. In effect, they are trying to change a partisan election into a nonpartisan election, at least as to themselves. This being the case, what can they claim as a "fair" method of access to the ballot? No party candidate may get on the ballot with a *petition* signed by 2 percent of the vote. A party candidate must win at the primary election. Can it be said that winning at the primary election is any less burdensome than a 5 percent signature requirement?²¹ *Cf. Jenness v. Forston, supra*, 403 U.S. 431, 440-41 (1970). Additionally, the state has a compelling interest in protecting the party system and party integrity. As the court below, and with a great deal of logic, held, there is no reason for the state to make it easy for independents to gain ballot space. Stated otherwise, the state has a rational and compelling state interest

20. See note 5, *supra*.

21. This point, though not necessary to nullifying the statewide candidate's claim to invidious discrimination, is however, equally applicable to him. Also a 5 percent signature requirement in and of itself is not attacked by appellants.

in seeing that its races for partisan office, which affect the state as a whole, are not essentially turned into races for nonpartisan offices by numerous local splinter groups of the so-called disaffected. The state may protect the party system.

In short, one set of rules apply to party candidates. Another set of rules apply to "independents." Both prescribe completely different routes for a candidate to attain ballot position. Neither can be said to be more or less burdensome than the other. *Cf. Lyons v. Davoren*, 402 F.2d 890, 893 (C.A.1 1968), *cert. denied*, 393 U.S. 1081 (1969); *Jackson v. Ogilvie*, *supra*, 325 F.Supp. 864, 868, *aff'd mem.*, 403 U.S. 925 (1971); *Wood v. Putterman* 316 F.Supp. 646, 650-51, *aff'd mem.*, 400 U.S. 859 (1970); *Christian Nationalist Party v. Jordan*, *supra*, 49 Cal.2d 448, 455, 318 P.2d 473, 476 (1957); *Socialist Party, U.S.A. v. Jordan*, 49 Cal.2d 864, 318 P.2d 479 (1957), *cert. denied*, 356 U.S. 952 (1957).

VIII. Assuming, *Arguendo*, That Any of the Provisions of the Independent Nomination Procedure Are Invalid, the Invalid Portion or Portions Should Be Severed, Leaving the Remainder of the Law Operative

Section 48 provides:

"If any provision of this code or the application thereof to any person or circumstance is held invalid, the remainder of the code and the application of such provision to other persons or circumstances shall not be affected thereby."

Therefore, assuming, *arguendo*, that the court should hold any of the provisions of the Independent Nomination Procedure invalid, the remaining provisions should still be left operative. For example, the Legislature would still desire the 5 percent signature requirement to remain in effect even were the Court, for example, to consider the 24-day period

for obtaining signatures too stringent. Likewise, the Legislature under section 48 would want the 5 percent signature requirement to remain in effect even were the court to believe that all electors should have the opportunity to sign independent nomination petitions.

In short, appellants urge the court to invalidate *all the substantive provisions* of the Independent Nomination Procedure, and yet leave the procedural provisions operative. If appellants were to have their way, the Independent Nomination Procedure would be left with the requirements of merely filing a piece of paper with the appropriate election official to gain ballot position. Section 48 does not prescribe such a result, but prohibits it.²² Cf. *Curtis v. Board of Supervisors*, 7 Cal.3d 942, 964, 104 Cal.Rptr. 297, 312-13, 501 P.2d 537, 552-53 (1972).

As stated in *Oregon v. Mitchell*, 400 U.S. 112, 131 (1970):

"... it is a longstanding canon of statutory construction that legislative enactments are to be enforced to the extent that they are not inconsistent with the Constitution, particularly where the valid portion of the statute does not depend upon the invalid part..."

IX. Appellants' Arguments in Storer and Hall Are Lacking in Merit

It is believed that the foregoing exposition of the facts and the law, and comments upon positions taken by appellants Storer and Hall traverses all the significant contentions presented by them, and demonstrates that their arguments are lacking in merit. However, we do wish to add

22. The Secretary of State urged severability below also. However, at such time we were not aware of section 48 and advised the court that there was no severability clause in the statute. See reporter's transcript, p. 28. For appellants Storer and Halls' position on severability below, see reporter's transcript, pp. 45-48.

Compare *Ragan v. Junkin*, *supra*, 85 Neb. 1, 122 N.W. 473, (1909), cited by appellants for another point, where severance was not possible.

a few additional comments for the purpose of further demonstrating the error of their arguments.

At page 23 of their brief, appellants Storer and Hall make the erroneous statement that the only justification we have advanced as a compelling state interest for upholding the Independent Nomination Procedure is keeping the ballot size manageable. Below, and herein, we have demonstrated that many of the provisions of the Independent Nomination Procedure advance the compelling state interest of insuring the preservation of party integrity and the party system.

Insofar as appellants at page 26 of their brief urge that the signatures for independent nominees must be collected in too short a period from an unidentifiable group of voters, we additionally point out (1) that nothing prevents independents from declaring their candidacy in advance, and soliciting promises of signatures in advance, see *Moore v. Board of Elections for District of Columbia, supra*, 319 F.Supp. 437, 438 (D.D.C. 1970, three-judge court), and (2) any group of voters is unidentifiable in any group of adults until you ask them their status or qualifications.

With regard to appellants' contention that it is virtually impossible for independents to appear on the ballot, we submit the following response: Have appellants examined all the records of the Secretary of State since the procedure was first instituted in the 19th century? To our knowledge, they have not. In fact, an individual *qualified and ran as an independent* for State Assembly, 40th District, at the November 1972 General Election.²³ The Secretary of State has

23. Certified List of Candidates, General Election, November 1972, compiled by Edmund G. Brown, Jr., Secretary of State. This is not reflected in the record below, but is a matter subject to judicial notice.

not undertaken to examine all his records to attempt to disprove this assertion of the appellants. Other examples perhaps might be uncovered. In *Baird v. Davoren, supra*, 346 F.Supp.515 (D.Mass.1972, three-judge court) the court upheld the independent nomination procedure against the contention that only twice in 33 years had independent candidates qualified for the ballot. Thus, where alternative means of access to candidacy exist, difficulty is not the equivalent of unconstitutionality.

Also, we do not understand appellants' position taken at pages 16 and 17 of their brief to the effect that an independent must wait 17 months from the time he defects from a qualified party before he may be a candidate, whereas a "genuine party hopper" is only required to wait seven months. Both sections 6401 and 6430 contain one year "non-affiliation" provisions. Also appellants try to measure the time prior to different elections, that is, the primary for the "party hopper" and the general for the "independent." Since a "party hopper" must file several months before the primary, he will have had to have disaffiliated with his *prior party for more than 17 months* before he can find his name on the *general election* ballot. §§ 6401, 6490. Appellants' argument, therefore, is in error.

Finally, with regard to appellants Hall and Tyner, we wish to emphasize that the 25,000 signatures alleged to have been collected were never verified as genuine signatures. The timing of the lower court's decision herein was (in the writer's personal knowledge) such as to preclude the necessity for a complete verification. Verification had commenced, but was halted. It is also to be noted that as to appellants Hall and Tyner, the Secretary of State took the position below that they and their supporters had no standing to sue because they proposed themselves as *direct* candidates for President and Vice President. The Inde-

pendent Nomination Procedure contemplates the independent nomination of a slate of presidential electors. §§ 6800, 6803, 6804. It was our position, and basically still is, that only a slate of electors would have had standing. See Appendix, page 52. Appellee's Points and Authorities filed August 25, 1972, pp. 5-6.

X. Additional Arguments of Appellant Frommhagen Are Also Lacking in Merit

Since Mr. Frommhagen has adopted the "Summary of Argument" of appellants Storer and Hall, most of the foregoing arguments of our brief are equally applicable to Mr. Frommhagen. They also traverse most of Mr. Frommhagen's contentions.

One point Mr. Frommhagen raises is new. He submits a letter from the Secretary of State of Georgia that no independent candidate qualified to run for Congress in 1968, 1970 and 1972. He then proposes that the 5 percent signature requirement and the filing fee standing alone should suffice to prevent a "laundry list" ballot. The argument fails to recognize two distinctions. California law *also* is designed to preserve party integrity, a compelling state interest. Secondly, what may be enough in Georgia, may not necessarily be enough in California. If access to the ballot were virtually unfettered, where would one more likely expect to find a "laundry list" ballot, in Athens, Georgia, or Berkeley, California? The answer should be obvious.

Finally, we wish to reemphasize that the freedom of anyone to sign a nominating petition in Georgia vis-a'-vis California's restriction is illusory. Whether in Georgia or in California, party affiliation or loyalty effectively removes a vast segment of persons from the pool of signers of independent nomination petitions.

XI. The Brief of Amicus Curiae Raises New Legal and Factual Issues Not Raised Below

Amicus curiae, The Committee for Democratic Election Laws, has filed a brief which attacks *solely* the 5 percent requirement of the Independent Nomination Procedure.

As was pointed out and documented in our Statement of the Case, neither appellants Storer nor Hall contended that the 5 percent requirement in and of itself was invalid, and virtually conceded its validity. Appellant Frommhagen has no argument with the 5 percent requirement by itself. Therefore, amicus curiae attempt to interject a new legal issue into this case not considered by the court below. In fact we declined to agree to their submitting a brief primarily on this basis.²⁴ Thereafter, and apparently without serving us with a copy of their motion,²⁵ they moved for leave to file their brief, which motion was granted. Based upon the foregoing alone, it would seem that the brief of amicus curiae should not even be considered by the Court.

However, an examination of their brief compounds this belief. It contains a 10 page affidavit of the Socialist Workers Party as to their version of why, *factually*, they did not even attempt to qualify for the ballot in California. Thus, a nonparty to these actions is submitting hearsay factual allegations to the United States Supreme Court which were never presented to the court below, or tried or decided by the court below. We submit this is a blatant improper attempt to try the case of the Socialist Workers

24. Letter to Mr. Reosti dated April 11, 1973, re The Committee for Democratic Election Laws, copy to the Clerk.

25. Therefore, we were not accorded the opportunity to oppose their motion. By letter to Mr. Reosti dated May 14, 1973, re The Committee for Democratic Election Laws, copy to the Clerk, we advised amicus that we had received notice of the granting of their motion to file as amicus, and would be interested in receiving a copy of their motion. It has not been received to this date.

Party as a matter of first impression before this Court. We therefore, will not, nor do we see why we should, attempt to answer the brief of amicus in any detail.

Several things were of interest, however, to us. At pages 4 and 5 of amicus curiae's brief, they state that in 1972 no candidate qualified in California under the 5 percent requirement. This is, of course, incorrect. See text at note 23, *supra*. Their research is also incorrect. They state at page 5 of their brief that since 1948 no party except the "American Independence Party" [sic] has gained ballot status in California or other enumerated states.

Thus, if amicus had even read our Motion to Affirm at page 16 they would know that in 1972 an independent qualified in California. If amicus had merely read the court's decision below they would have discovered that California had *four* parties on the ballot in 1972. This would have provided the clue (or reading our Motion to Affirm would have provided the answer) that the Peace and Freedom Party also qualified for ballot status in 1968. Even communication with appellants could have elicited this basic fact.

Insofar as amicus curiae attempts to claim that the signature requirements impose a wealth requirement on candidacy, we believe that the following language of the California Supreme Court provides the cogent answer. The court, against a similar contention as to the predecessor to section 6430 stated in *Christian Nationalist Party v. Jordan*, *supra*, 49 Cal.2d 448, 454-55, 318 P.2d 473, 476 (1957):

"It is true, of course, that a presently insubstantial group may be required to make expenditures in seeking qualification, but any numerical test would have the same effect. The statute does not impose any financial requirement but only restrictions based on numerical data, and the circumstance that every group call-

ing itself a party may not be able to obtain funds which it estimates would enable it to win the necessary support among the voters of the state does not show that the restrictions are not reasonably designed to advance a vital public purpose. . . . It must again be emphasized that the subdivisions under which non-participating parties may qualify are alternatives, and they may not be taken separately in considering whether they are discriminatory. While the percentage in subdivision (c) is substantially larger than that in subdivision (a), the percentage in subdivision (b) is only one-third as great. In view of the weight to be accorded legislative determinations in this field, section 2540 may not be regarded as discriminating among parties of the same size."

If amicus curiae believes the 5 percent requirement is unduly burdensome, let "independent parties" utilize the California's 1 percent registration alternative of section 6430 which is available to them, or let individual independent candidates utilize the write-in procedure.

CONCLUSION

California's Election Laws, viewed in their totality, provide reasonable and viable means for the qualification of third parties and "independent parties" under the provisions of section 6430. In fact under the liberal provisions of subdivision (c) of this section, there could be 100 parties qualified in California. The fluidity of political life is insured by this section alone. Therefore, the Independent Nomination Procedure need only meet the "rational basis test." It is a true legislative bonus!

However, even assuming the Independent Nomination Procedure must pass the strict scrutiny test, it does, serving the compelling interests of protecting the ballot from

proliferation as well as protecting the party system from disintegration.

Individual candidates, not wishing to avail themselves of section 6430 or 6800 *et seq.*, may still be write-in candidates.

The court below correctly analyzed California's laws and correctly held that there are an adequate number of routes to the ballot to satisfy appellants' fundamental political and associational rights and rights to equal protection of the laws.

It is respectfully submitted that the judgment below should be affirmed.

Dated: July 13, 1973

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[Appendices Follow]

Appendix A

Constitutional Provisions

United States Constitution, Article I, Section 4, Clause 1:

"1. The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

United States Constitution, Article II, Section 1, Clause 2:

"2. Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector."

California Constitution, Article II, Section 4:

"Sec. 4. The Legislature shall provide for primary elections for partisan offices, including an open presidential primary whereby the candidates on the ballot are those found by the Secretary of State to be recognized candidates throughout the nation or throughout California for the office of President of the United States, and those whose names are placed on the ballot by petition, but excluding any candidate who has withdrawn by filing an affidavit that he is not a candidate."
(Added Nov. 7, 1972.)

Appendix B

California Elections Code Provisions Defining Qualified Parties—Also Signature Requirements

§ 6430. Qualified parties

"A party is qualified to participate in any primary election:

(a) If at the last preceding gubernatorial election there was polled for any one of its candidates who was the candidate of that party only for any office voted on throughout the State, at least 2 percent of the entire vote of the State; or

(b) If at the last preceding gubernatorial election there was polled for any one of its candidates who, upon the date of that election, as shown by the affidavits of registration of voters in the county of his residence, was affiliated with that party and was the joint candidate of that party and any other party for any office voted on throughout the State, at least 6 percent of the entire vote of the State; or

(c) If on or before the 135th day before any primary election, it appears to the Secretary of State, as a result of examining and totaling the statement of voters and their political affiliations transmitted to him by the county clerks, that voters equal in number to at least 1 percent of the entire vote of the State at the last preceding gubernatorial election have declared their intention to affiliate with that party; or

(d) If on or before the 135th day before any primary election, there is filed with the Secretary of State a petition signed by voters, equal in number to at least 10 percent of the entire vote of the State at the last preceding gubernatorial election, declaring that they represent a proposed party, the name of which shall be stated in the petition, which proposed party those voters desire to have partici-

pate in that primary election. This petition shall be circulated, signed, verified and the signatures of the voters on it shall be certified to and transmitted to the Secretary of State by the county clerks substantially as provided for initiative petitions. Each page of the petition shall bear a caption in 18-point blackface type, which caption shall be the name of the proposed party followed by the words 'Petition to participate in the primary election.' No voters or organization of voters shall assume a party name or designation which is so similar to the name of an existing party as to mislead voters.

Whenever the registration of any party which qualified in the previous direct primary election falls below one-fifteenth of 1 percent of the total state registration, that party shall not be qualified to participate in the primary election but shall be deemed to have been abandoned by the voters, since the expense of printing ballots and holding a primary election would be an unjustifiable expense and burden to the State for so small a group. The Secretary of State shall immediately remove the name of the party from any list, notice, ballot, or other publication containing the names of the parties qualified to participate in the primary election."

§ 6495. Number of sponsors required

"The number of sponsors required for the respective offices are as follows:

(a) State office or United States Senate, not less than 65 nor more than 100.

(b) House of Representatives in Congress, State Senate or Assembly, Board of Equalization, or any office voted for in more than one county, and not statewide, not less than 40 nor more than 60.

(c) Candidacy in a single county or any political subdivision of a county, other than State Senate or Assembly, not less than 20 nor more than 30.

(d) When any political party has less than 50 voters in the state or in the county or district in which the election is to be held, one-tenth the number of voters of the party.

(e) When there are less than 150 voters in the county or district in which the election is to be held, not less than 10 nor more than 20."

§ 6080. "Basis of percentage" (Presidential Primary)

"As used in this article, 'basis of percentage' means:

(a) If a party's candidate for Governor was the candidate of the party alone, the vote polled for the party's candidate for Governor at the last preceding general election at which a Governor was elected.

(b) If a party's candidate for Governor was not the candidate of that party alone, the vote polled at the last preceding general election by that one of the party's candidates voted on throughout the State who received the greatest number of votes of all of the party's candidates who were the candidates of that party alone.

(c) If a party had no candidate voted on throughout the State who was the candidate of that party alone, the vote polled at the last preceding general election by that one of the party's candidates voted on throughout the State who received the greatest number of votes of all the party's candidates who were the candidates of the party in conjunction with one or more other parties."

§ 6082. Signatures on nomination papers (Presidential Primary)

"Nomination papers for candidates for delegates of any party shall be signed by not less than one-half of 1 percent

and not more than 2 percent of the vote constituting the basis of percentage.”*

*See also §§ 6345 and 6347 for similar requirements applicable solely to Democratic Party.

Appendix C
California Elections Code Provisions
Providing for Write-in Candidates

§ 6260. Ballot; space for write-in

"Notwithstanding any other provisions of law, a space shall be provided on the presidential primary ballot for an elector to write in the name of a candidate for President of the United States."

§ 6261. Candidate's endorsement of candidacy; filing

"Any person who believes his name may be used as a write-in candidate for President of the United States shall, not later than eight days before the primary election, file his endorsement of his write-in candidacy with the Secretary of State, or no votes shall be counted for him."

§ 6262. Delegates to national convention; selection by candidate

"Any person who receives, by write-in vote, a plurality of the votes cast for President of the United States shall, within 10 days after the primary election, file a list of delegates to the national convention of his political party with the Secretary of State in the manner prescribed in Sections 6053 and 6054."

§ 6263. Delegates to national convention; selection by state central committee

"If the candidate fails to file a list of delegates, the state central committee of the party in whose primary the candidate received the plurality vote shall within 10 days of the end of the 10-day period required in Section 6262, file a list of delegates with the Secretary of State. The delegation shall go to the convention unpledged to any candidate."

§ 10213. Ballot size

"A ballot shall not exceed 24 inches in length, and shall be three inches in width and as many times that width as may be necessary to contain all of the names of candidates nominated, with proper blank spaces to allow the voter to write in names not printed on the ballot. The ballot shall also contain a separate column or columns of sufficient width for statements of all measures submitted to the voters."

§ 10229. Instructions to voters; presidential electors; party electors

"In elections when electors of President and Vice President of the United States are to be chosen, there shall be placed upon the ballot, in addition to the instructions to voters as provided in this article, an instruction as follows: 'To vote for all of the electors of a party, stamp a cross (+) in the square opposite the names of the presidential and vice presidential candidates of that party. A cross (+) stamped in the square opposite the name of a party and its presidential and vice presidential candidate, is a vote for all of the electors of that party, but for no other candidates.' This instruction shall appear immediately before the words: 'To vote for a person not on the ballot.'"

If a group of candidates for electors has been nominated under the provisions of Chapter 3 (commencing at Section 6800) of Division 5, and has under the provisions of Article 1 (commencing at Section 6800) of that chapter designated the names of the candidates for President and Vice President of the United States for whom those candidates have pledged themselves to vote, the instructions to voters shall also contain the following:

'To vote for those electors who have pledged themselves to vote for a candidate for President and Vice President not supported by any particular party stamp a cross (+) in the square opposite the names of those presidential and vice presidential candidates.'

If a group of candidates for electors has been nominated by a party not qualified to participate in the election, the instructions to voters shall also contain the following:

'To vote for those electors who have pledged themselves to vote for a candidate for President and for Vice President of any party not qualified to participate in the election write in the names and party of those presidential and vice presidential candidates in the blank space provided for that purpose.'

The names of presidential and vice presidential candidates and a list of presidential electors of nonqualified political parties shall be filed with the Secretary of State at least 60 days prior to the election."

§ 18600. Write-in votes

"Any name written upon a ballot shall be counted, unless prohibited by Section 18603, for that name for the office under which it is written, if it is written in the blank space therefor, whether or not a cross (+) is stamped or made with pen or pencil in the voting square after the name so written."

§ 18601. Declaration required

"Every person who desires to have his name as written on the ballots of an election counted for a particular office shall file a declaration stating that he is a write-in candidate for the nomination for or election to the particular office and giving the title of that office."

§ 18602. Declaration; filing

"The declaration required by Section 18601 shall be filed no later than the eighth day prior to the election to which it applies. It shall be filed with the clerks, registrar of voters, or district secretary responsible for the conduct of the election in which the candidate desires to have write-in votes of his name counted."

§ 18603. Requirements for tabulation of write-in vote

"No name written upon a ballot in any state, county, city, city and county, or district election shall be counted for an office or nomination unless

(a) A declaration has been filed pursuant to Sections 18601 and 18602 declaring a write-in candidacy for that particular person for that particular office or nomination and

(b) The fee required by Section 6555 is paid when the declaration of write-in candidacy is filed pursuant to Section 18602."

§ 18604. Write-in votes in primary election

"In a primary election, write-in votes shall be counted for each person whose name appears on a ballot as a candidate for nomination for the same office by another party, notwithstanding his failure to comply with the provisions of Sections 18601, 18602, and 18603."

Appendix D

California Elections Code Provisions—Direct Primary Law—Relating to Party Integrity

§ 6401. Party affiliation

"No declaration of candidacy for a partisan office or for membership on a county central committee shall be filed, either by the candidate himself or by sponsors on his behalf, (1) unless at the time of presentation of the declaration and continuously for not less than three months immediately prior to that time, or for as long as he has been eligible to register to vote in the state, the candidate is shown by his affidavit of registration to be affiliated with the political party the nomination of which he seeks, and (2) the candidate has not been registered as affiliated with a political party other than that political party the nomination of which he seeks within 12 months immediately prior to the filing of the declaration.

The county clerk shall attach a certificate to the declaration of candidacy showing the date on which the candidate registered as intending to affiliate with the political party the nomination of which he seeks, and indicating that the candidate has not been affiliated with any other political party for the 12-month period immediately preceding the filing of the declaration." Underscore added 1972 Legislature.

§ 6402. Independent nominees

"This chapter does not prohibit the independent nomination of candidates under the provisions of Chapter 3 (commencing at Section 6800) of this division, subject to the following limitations:

(a) A candidate whose name has been on the ballot as a candidate of a party at the direct primary and who has been defeated for that party nomination is ineligible for nomination as an independent candidate. He is also ineligible as a

candidate named by a party central committee to fill a vacancy on the ballot for a general election.

(b) No person may file nomination papers for a party nomination and an independent nomination for the same office, or for more than one office at the same election."

§ 6611. Unsuccessful candidate; ineligibility as candidate of another party

"A candidate who fails to receive the highest number of votes for the nomination of the political party with which he was registered as affiliated on the date his declaration of candidacy or declaration of acceptance of nomination was filed with the county clerk cannot be the candidate of any other political party."

Appendix E

California Elections Code Provisions—Independent Nomination Procedure—including Those Relating to Party Integrity

§ 6800. Scope of chapter

“A candidate for any public office, including that of presidential elector, for which no nonpartisan candidate has been nominated or elected at any primary election, may be nominated subsequent to or in lieu of a primary election pursuant to this chapter.”

§ 6801. Defeated partisan candidates

“A candidate for whom a nomination paper has been filed as a partisan candidate at a primary election, and who is defeated for his party nomination at the primary election, is ineligible for nomination as an independent candidate.”

§ 6803. Group of candidates for presidential electors; designation of presidential and vice presidential candidates

“Whenever a group of candidates for presidential electors, equal in number to the number of presidential electors to which this State is entitled, files a nomination paper with the Secretary of State pursuant to this chapter, the nomination paper may contain the name of the candidate for President of the United States and the name of the candidate for Vice President of the United States for whom all of those candidates for presidential electors pledge themselves to vote.”

§ 6804. Printing of names on ballot

“When a group of candidates for presidential electors designates the presidential and vice presidential candidates for whom all of the group pledge themselves to vote, the names of the presidential candidate and vice presidential

candidate designated by that group shall be printed on the ballot pursuant to Article 1 (commencing at Section 10200) of Chapter 2 of Division 7."

§ 6830. Contents

"Each candidate or group of candidates shall file a nomination paper which shall contain:

(a) The name and residence address of each candidate, including the name of the county in which he resides.

(b) A designation of the office for which the candidate or group seeks nomination.

(c) A statement that the candidate and each signer of his nomination paper did not vote at the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper. The statement required in this subdivision shall be omitted when no candidate was nominated for the office at the preceding primary election.

(d) A statement that the candidate is not, and was not at any time during the one year preceding the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper, registered as affiliated with a political party qualified under the provisions of Section 6430. The statement required by this subdivision shall be omitted when no primary election was held to nominate candidates for the office to which the independent nomination paper is directed."

§ 6831. Signatures required

"Nomination papers shall be signed by voters of the area for which the candidate is to be nominated, not less in number than 5 percent nor more than 6 percent of the entire vote cast in the area at the preceding general election. Nomination papers for Representative in Congress, State Senator or Assemblyman, to be voted for at a special elec-

tion to fill a vacancy, shall be signed by voters in the district not less in number than 500 or 1 percent of the entire vote cast in the area at the preceding general election, whichever is less, nor more than 1,000."

§ 6833. Time for filing, circulation and signing; verification

"Nomination papers required to be filed with the Secretary of State or with the county clerk shall be filed not more than 79 nor less than 54 days before the day of the election, but shall be prepared, circulated, signed, verified and left with the county clerk for examination, or for examination and filing, no earlier than 84 days before the election and no later than 5 p.m. 60 days before the election. If the total number of signatures submitted to a county clerk for an office entirely within that county does not equal the number of signatures needed to qualify the candidate, the county clerk shall declare the petition void and is not required to verify the signatures. If the district falls within two or more counties, the county clerk shall within two working days report in writing to the Secretary of State the total number of signatures filed. If the Secretary of State finds that the total number of signatures filed in the district or state is less than the minimum number required to qualify the candidate he shall within one working day notify in writing the counties involved that they need not verify the signatures."

Appendix F**California Elections Code—Severability Provision****§ 48. Partial invalidity**

“If any provision of this code or the application thereof to any person or circumstances is held invalid, the remainder of the code and the application of such provision to other persons or circumstances shall not be affected thereby.”

STORER ET AL. v. BROWN, SECRETARY OF
STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA

No. 72-812. Argued November 5, 1973—Decided March 26, 1974*

Section 6830 (d) (Supp. 1974) of the California Elections Code forbids ballot position to an independent candidate for elective public office if he had a registered affiliation with a qualified political party within one year prior to the immediately preceding primary election; § 6831 (1961) requires an independent candidate's nominating papers to be signed by no less than 5% nor more than 6% of the entire vote cast in the preceding general election; § 6833 (Supp. 1974) requires all such signatures to be obtained during a 24-day period following the primary and ending 60 days prior to the general election; and § 6830 (c) (Supp. 1974) requires that none of such signatures be those of persons who voted at the primary. Appellants Storer and Frommhagen were disqualified under § 6830 (d) (Supp. 1974) for ballot status as independent candidates for Congress in the 1972 California elections because they were affiliated with a qualified party no more than six months prior to the primary. Appellants Hall and Tyner were disqualified for ballot status as independent candidates for President and Vice President in the same election for failure to meet petition requirements. Appellants brought actions challenging the constitutionality of the above provisions, claiming that their combined effect infringed on rights guaranteed by the First and Fourteenth Amendments. A three-judge District Court dismissed the complaints, concluding that the statutes served a sufficiently important state interest to sustain their constitutionality. *Held*:

1. Section 6830 (d) (Supp. 1974) is not unconstitutional, and appellants Storer and Frommhagen (who were affiliated with a qualified party no more than six months before the primary) were properly barred from the ballot as a result of its application. Pp. 728-737.

(a) The provision reflects a general state policy aimed at maintaining the integrity of the various routes to the ballot, and

*Together with No. 72-6050, *Frommhagen v. Brown, Secretary of State of California, et al.*, also on appeal from the same court.

involves no discrimination against independents. Though an independent candidate must be clear of party affiliations for a year before the primary, a party candidate under § 6490 (Supp. 1974) of the Code must not have been registered with another party for a year before he files his declaration, which must be done not less than 83 days and not more than 113 days prior to the primary. Pp. 733-734.

(b) The provision protects the direct primary process, which is an integral part of the entire election process, by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot; works against independent candidacies prompted by short-range political goals, pique, or a personal quarrel; is a substantial barrier to a party fielding an "independent" candidate to capture and bleed off votes in the general election that might well go to another party; and thus furthers the State's compelling interest in the stability of its political system, outweighing the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status. Pp. 734-735.

2. Further proceedings should be had in the District Court to permit additional findings concerning the extent of the burden imposed on independent candidates for President and Vice President under California law, particularly with respect to whether § 6831 (1961) and § 6833 (Supp. 1974) place an unconstitutional restriction on access by appellants Hall and Tyner to the ballot. Pp. 738-746.

(a) It should be determined whether the available pool of possible signers of the nominating papers is so diminished by the disqualification of those who voted in the primary that the 5% provision, which as applied here apparently imposes a 325,000-signature requirement, to be satisfied in 24 days, is unduly onerous. Pp. 739-740.

(b) While the District Court apparently took the view that California law disqualified anyone who voted in the primary from signing an independent's petition, whether or not the vote was confined to nonpartisan matters, it would be difficult on the record before this Court to ascertain any rational ground, let alone a compelling interest, for disqualifying nonpartisan primary voters. Pp. 741-742.

(c) Once the District Court ascertains the number of signatures required in the 24-day period, along with the total pool from which they may be drawn, the court then, in determining whether

in the context of California politics a reasonably diligent independent candidate could be expected to satisfy the signature requirements or will only rarely succeed in securing ballot placement, should consider not only past experience, but also the relationship between the showing of support through a petition requirement and the percentage of the vote the State can reasonably expect of a candidate who achieves ballot status in the general election. Pp. 742-746.

Affirmed in part, vacated and remanded in part.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 755.

Paul N. Halvonik and Joseph Remcho argued the cause for appellants in both cases. With them on the brief for appellants in No. 72-812 was *Charles C. Marson*. Appellant *pro se* filed a brief in No. 72-6050.

Clayton P. Roche, Deputy Attorney General of California, argued the cause for appellee Brown in both cases. With him on the brief were *Evelle J. Younger*, Attorney General, and *Iver E. Skjeie*, Assistant Attorney General.[†]

MR. JUSTICE WHITE delivered the opinion of the Court.

The California Elections Code forbids ballot position to an independent candidate for elective public office if he voted in the immediately preceding primary, § 6830 (c) (Supp. 1974),¹ or if he had a registered affiliation with a qualified political party at any time within one year prior to the immediately preceding primary election. § 6830 (d) (Supp. 1974). The independent candidate must also file nomination papers signed by no less than

[†]*Rolland R. O'Hare* filed a brief for the Committee for Democratic Election Laws as *amicus curiae* in No. 72-812.

¹The relevant provisions of the California Elections Code are printed in the appendix to this opinion.

5% nor more than 6% of the entire vote cast in the preceding general election in the area for which the candidate seeks to run. § 6831 (1961). All of these signatures must be obtained during a 24-day period following the primary and ending 60 days prior to the general election, § 6833 (Supp. 1974), and none of the signatures may be gathered from persons who vote at the primary election. § 6830 (c) (Supp. 1974). The constitutionality of these provisions is challenged here as infringing on rights guaranteed by the First and Fourteenth Amendments and as adding qualifications for the office of United States Congress, contrary to Art. I, § 2, cl. 2, of the Constitution.

Prior to the 1972 elections, appellants Storer, Frommhagen, Hall, and Tyner, along with certain of their supporters, filed their actions² to have the above sections of the Elections Code declared unconstitutional and their enforcement enjoined. Storer and Frommhagen each sought ballot status as an independent candidate for Congress in his district.³ Both complained about the party disaffiliation requirement of § 6830 (d) (Supp. 1974) and asserted that the combined effects of the provisions were unconstitutional burdens on their First and Fourteenth Amendment rights. Hall and Tyner claimed the right to ballot position as independent candidates for President and Vice President of the United States. They were members of the Communist Party but that party

² Storer's action, No. 72-812, was filed first. Frommhagen was allowed to intervene. Hall and Tyner later filed suit. In its opinion the District Court noted that "[b]y appropriate orders and stipulations, although the cases were never consolidated, the parties to *Hall* will be bound by the rulings made in *Storer* which are common to both cases and any separate issues in *Hall* stand submitted without further briefing or oral argument. The view taken by the Court herein is such that there are no separate issues in *Hall* and the rulings expressed are dispositive of both cases."

³ Storer sought to be a candidate from the Sixth Congressional District, Frommhagen from the Twelfth.

had not qualified for ballot position in California. They, too, complained of the combined effect of the indicated sections of the Elections Code on their ability to achieve ballot position.

A three-judge District Court concluded that the statutes served a sufficiently important state interest to sustain their constitutionality and dismissed the complaints. Two separate appeals were taken from the judgment. We noted probable jurisdiction and consolidated the cases for oral argument. 410 U. S. 965 (1973).

I

We affirm the judgment of the District Court insofar as it refused relief to Storer and Frommhamen with respect to the 1972 general election. Both men were registered Democrats until early in 1972, Storer until January and Frommhamen until March of that year. This affiliation with a qualified political party within a year prior to the 1972 primary disqualified both men under § 6830 (d) (Supp. 1974); and in our view the State of California was not prohibited by the United States Constitution from enforcing that provision against these men.

In *Williams v. Rhodes*, 393 U. S. 23 (1968), the Court held that although the citizens of a State are free to associate with one of the two major political parties, to participate in the nomination of their chosen party's candidates for public office and then to cast their ballots in the general election, the State must also provide feasible means for other political parties and other candidates to appear on the general election ballot. The Ohio law under examination in that case made no provision for independent candidates and the requirements for any but the two major parties qualifying for the ballot were so burdensome that it was "virtually impossible" for other parties, new or old, to achieve ballot position for their can-

didates. *Id.*, at 25. Because these restrictions, which were challenged under the Equal Protection Clause, severely burdened the right to associate for political purposes and the right to vote effectively, the Court, borrowing from other cases, ruled that the discriminations against new parties and their candidates had to be justified by compelling state interests. The Court recognized the substantial state interest in encouraging compromise and political stability, in attempting to ensure that the election winner will represent a majority of the community and in providing the electorate with an understandable ballot and inferred that "reasonable requirements for ballot position," *id.*, at 32, would be acceptable. But these important interests were deemed insufficient to warrant burdens so severe as to confer an effective political monopoly on the two major parties. The First and Fourteenth Amendments, including the Equal Protection Clause of the latter, required as much.

In challenging § 6830 (d) (Supp. 1974), appellants rely on *Williams v. Rhodes* and assert that under that case and subsequent cases dealing with exclusionary voting and candidate qualifications, *e. g.*, *Dunn v. Blumstein*, 405 U. S. 330 (1972); *Bullock v. Carter*, 405 U. S. 134 (1972); *Kramer v. Union Free School District*, 395 U. S. 621 (1969), substantial burdens on the right to vote or to associate for political purposes are constitutionally suspect and invalid under the First and Fourteenth Amendments and under the Equal Protection Clause unless essential to serve a compelling state interest. These cases, however, do not necessarily condemn § 6830 (d) (Supp. 1974). It has never been suggested that the *Williams-Kramer-Dunn* rule automatically invalidates every substantial restriction on the right to vote or to associate. Nor could this be the case under our Constitution where the States are given the initial task of determining the

qualifications of voters who will elect members of Congress. Art. I, § 2, cl. 1. Also Art. I, § 4, cl. 1, authorizes the States to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." Moreover, as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. In any event, the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates.

It is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases; and the rule fashioned by the Court to pass on constitutional challenges to specific provisions of election laws provides no litmus-paper test for separating those restrictions that are valid from those that are invidious under the Equal Protection Clause. The rule is not self-executing and is no substitute for the hard judgments that must be made. Decision in this context, as in others, is very much a "matter of degree," *Dunn v. Blumstein*, *supra*, at 348, very much a matter of "consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification." *Williams v. Rhodes*, *supra*, at 30; *Dunn v. Blumstein*, *supra*, at 335. What the result of this process will be in any specific case may be very difficult to predict with great assurance.

The judgment in *Dunn v. Blumstein* invalidated the Tennessee one-year residence requirement for voting but agreed that the State's interest was obviously sufficient

to limit voting to residents, to require registration for voting, and to close the registration books at some point prior to the election, a deadline which every resident must meet if he is to cast his vote at the polls. Subsequently, three-judge district courts differed over the validity of a requirement that voters be registered for 50 days prior to election. This Court, although divided, sustained the provision. *Burns v. Fortson*, 410 U. S. 686 (1973); *Marston v. Lewis*, 410 U. S. 679 (1973).

Rosario v. Rockefeller, 410 U. S. 752 (1973), is more relevant to the problem before us. That case dealt with a provision that to vote in a party primary the voter must have registered as a party member 30 days prior to the previous general election, a date eight months prior to the presidential primary and 11 months prior to the nonpresidential primary. Those failing to meet this deadline, with some exceptions, were barred from voting at either primary. We sustained the provision as "in no sense invidious or arbitrary," because it was "tied to [the] particularized legitimate purpose," *id.*, at 762, of preventing interparty raiding, a matter which bore on "the integrity of the electoral process." *Id.*, at 761.

Later the Court struck down similar Illinois provisions aimed at the same evil, where the deadline for changing party registration was 23 months prior to the primary date. *Kusper v. Pontikes*, 414 U. S. 51 (1973). One consequence was that a voter wishing to change parties could not vote in any primary that occurred during the waiting period. The Court did not retreat from *Rosario* or question the recognition in that case of the States' strong interest in maintaining the integrity of the political process by preventing interparty raiding. Although the 11-month requirement imposed in New York had been accepted as necessary for an effective remedy, the Court was unconvinced that the 23-month period estab-

lished in Illinois was an essential instrument to counter the evil at which it was aimed.

Other variables must be considered where qualifications for candidates rather than for voters are at issue. In *Jenness v. Fortson*, 403 U. S. 431 (1971), we upheld a requirement that independent candidates must demonstrate substantial support in the community by securing supporting signatures amounting to 5% of the total registered voters in the last election for filling the office sought by the candidate. The Court said:

"There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Id.*, at 442.

Subsequently, in *Bullock v. Carter*, 405 U. S., at 145, a unanimous Court said:

"The Court has recognized that a State has a legitimate interest in regulating the number of candidates on the ballot. *Jenness v. Fortson*, 403 U. S., at 442; *Williams v. Rhodes*, 393 U. S., at 32. In so doing, the State understandably and properly seeks to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections. Although we have no way of gauging the number of candidates who might enter primaries in Texas if access to the ballot were unimpeded by the large filing fees in question here, we are bound to respect the legitimate objectives of the State in avoiding overcrowded bal-

lots. Moreover, a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies. *Jenness v. Fortson*, 403 U. S., at 442."

Against this pattern of decisions we have no hesitation in sustaining § 6830 (d) (Supp. 1974). In California, the independent candidacy route to obtaining ballot position is but a part of the candidate-nominating process, an alternative to being nominated in one of the direct party primaries. The independent candidate need not stand for primary election but must qualify for the ballot by demonstrating substantial public support in another way. Otherwise, the qualifications required of the independent candidate are very similar to, or identical with, those imposed on party candidates. Section 6401 (Supp. 1974) imposes a flat disqualification upon any candidate seeking to run in a party primary if he has been "registered as affiliated with a political party other than that political party the nomination of which he seeks within 12 months immediately prior to the filing of the declaration." Moreover, §§ 6402 and 6611 provide that a candidate who has been defeated in a party primary may not be nominated as an independent or be a candidate of any other party; and no person may file nomination papers for a party nomination and an independent nomination for the same office, or for more than one office at the same election.

The requirement that the independent candidate not have been affiliated with a political party for a year before the primary is expressive of a general state policy aimed at maintaining the integrity of the various routes to the ballot. It involves no discrimination against independents. Indeed, the independent candidate must be clear of political party affiliations for a year before the primary; the party candidate must not have been registered with another party for a year before he files

his declaration, which must be done not less than 83 and not more than 113 days prior to the primary. § 6490 (Supp. 1974).

In *Rosario v. Rockefeller*, there was an 11-month waiting period for voters who wanted to change parties. Here, a person terminating his affiliation with a political party must wait at least 12 months before he can become a candidate in another party's primary or an independent candidate for public office. The State's interests recognized in *Rosario* are very similar to those that undergird the California waiting period; and the extent of the restriction is not significantly different. It is true that a California candidate who desires to run for office as an independent must anticipate his candidacy substantially in advance of his election campaign, but the required foresight is little more than the possible 11 months examined in *Rosario*, and its direct impact is on the candidate, and not voters. In any event, neither Storer nor Frommshagen is in position to complain that the waiting period is one year, for each of them was affiliated with a qualified party no more than six months prior to the primary. As applied to them, § 6830 (d) (Supp. 1974) is valid.

After long experience, California came to the direct party primary as a desirable way of nominating candidates for public office. It has also carefully determined which public offices will be subject to partisan primaries and those that call for nonpartisan elections.⁴ Moreover, after long experience with permitting candidates to run in the primaries of more than one party, California forbade the cross-filing practice in 1959.⁵ A candidate in

⁴The California Elections Code § 41 provides that judicial, school, county, and municipal offices are nonpartisan offices for which no party may nominate a candidate.

⁵See Gaylord, *History of the California Election Laws* 59, contained in West's Ann. Elec. Code (1961), preceding §§ 1-11499.

one party primary may not now run in that of another; if he loses in the primary, he may not run as an independent; and he must not have been associated with another political party for a year prior to the primary. See §§ 6401, 6611. The direct party primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process,⁶ the initial stage in a two-stage process by which the people choose their public officers. It functions to winnow out and finally reject all but the chosen candidates. The State's general policy is to have contending forces within the party employ the primary campaign and primary election to finally settle their differences. The general election ballot is reserved for major struggles; it is not a forum for continuing intraparty feuds. The provision against defeated primary candidates running as independents effectuates this aim, the visible result being to prevent the losers from continuing the struggle and to limit the names on the ballot to those who have won the primaries and those independents who have properly qualified. The people, it is hoped, are presented with understandable choices and the winner in the general election with sufficient support to govern effectively.

Section 6830 (d) (Supp. 1974) carries very similar credentials. It protects the direct primary process by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot. It works against independent candidacies prompted by short-range political goals, pique, or personal quarrel. It is also a substantial barrier to a party fielding an "independent" candidate to capture and bleed off votes in the general election that might well go to another party.

⁶ See *In re McGee*, 36 Cal. 2d 592, 226 P. 2d 1 (1951).

A State need not take the course California has, but California apparently believes with the founding fathers that splintered parties and unrestrained factionalism may do significant damage to the fabric of government. See *The Federalist*, No. 10 (Madison). It appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, but compelling and as outweighing the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status. Nor do we have reason for concluding that the device California chose, § 6830 (d) (Supp. 1974), was not an essential part of its overall mechanism to achieve its acceptable goals. As we indicated in *Rosario*, the Constitution does not require the State to choose ineffectual means to achieve its aims. To conclude otherwise might sacrifice the political stability of the system of the State, with profound consequences for the entire citizenry, merely in the interest of particular candidates and their supporters having instantaneous access to the ballot.

We conclude that § 6830 (d) (Supp. 1974) is not unconstitutional, and Storer and Frommhamen were properly barred from the ballot as a result of its application.⁷ Cf. *Lippitt v. Cipollone*, 404 U. S. 1032 (1972). Having reached this result, there is no need to examine the constitutionality of the other provisions of the Elections Code as they operate singly or in combination as applied to these candidates. Even if these statutes were wholly or partly unconstitutional, Storer and Frommhamen were still properly barred from having their names placed on

⁷ Moreover, we note that the independent candidate who cannot qualify for the ballot may nevertheless resort to the write-in alternative provided by California law, see §§ 18600-18603 (Supp. 1974).

the 1972 ballot. Although *Williams v. Rhodes*, 393 U. S., at 34, spoke in terms of assessing the "totality" of the election laws as they affected constitutional rights, if a candidate is absolutely and validly barred from the ballot by one provision of the laws, he cannot challenge other provisions as applied to other candidates. The concept of "totality" is applicable only in the sense that a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights. The disaffiliation requirement does not change its character when combined with other provisions of the electoral code. It is an absolute bar to candidacy, and a valid one. The District Court need not have heard a challenge to these other provisions of the California Elections Code by one who did not satisfy the age requirement for becoming a member of Congress, and there was no more reason to consider them at the request of Storer and Frommshagen or at the request of voters who desire to support unqualified candidates.⁸

⁸ The 1972 election is long over, and no effective relief can be provided to the candidates or voters, but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the California statutes are applied in future elections. This is, therefore, a case where the controversy is "capable of repetition, yet evading review." *Rosario v. Rockefeller*, 410 U. S. 752, 756 n. 5 (1973); *Dunn v. Blumstein*, 405 U. S. 330, 333 n. 2 (1972); *Moore v. Ogden*, 394 U. S. 814, 816 (1969); *Southern Pacific Terminal Co. v. ICC*, 219 U. S. 498, 515 (1911). The "capable of repetition, yet evading review" doctrine, in the context of election cases, is appropriate when there are "as applied" challenges as well as in the more typical case involving only facial attacks. The construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated before an election is held.

II

We come to different conclusions with respect to Hall and Tyner.⁹ As to these two men we vacate the judgment of the District Court and remand the case for further proceedings to determine whether the California election laws place an unconstitutional burden on their access to the ballot.

We start with the proposition that the requirements for an independent's attaining a place on the general election ballot can be unconstitutionally severe, *Williams v. Rhodes, supra*. We must, therefore, inquire as to the nature, extent, and likely impact of the California requirements.

Beyond the one-year party disaffiliation condition and the rule against voting in the primary, both of which Hall apparently satisfied, it was necessary for an independent candidate to file a petition signed by 5% of the total number of votes cast in California at the last general election. This percentage, as such, does not appear to be excessive, see *Jenness v. Fortson, supra*, but to assess realistically whether the law imposes excessively burdensome requirements upon independent candidates it is necessary to know other critical facts which do not appear from the evidentiary record in this case.

⁹ In California, presidential electors must meet candidacy requirements and file their nomination papers with the required signatures. §§ 6803, 6830. The State claims, therefore, that the electors, not Hall and Tyner, are the only persons with standing to raise the validity of the signature requirements. But it is Hall's and Tyner's names that go on the California ballot for consideration of the voters. § 6804. Without the necessary signatures this will not occur. It is apparent, contrary to the State's suggestion, that Hall and Tyner have ample standing to challenge the signature requirement.

Hereafter, in the text and notes, reference to Hall should be understood as referring also to Tyner.

It is necessary in the first instance to know the "entire vote" in the last general election. Appellees suggest that 5% of that figure, whatever that is, is 325,000. Assuming this to be the correct total signature requirement, we also know that it must be satisfied within a period of 24 days between the primary and the general election. But we do not know the number of qualified voters from which the requirement must be satisfied within this period of time. California law disqualifies from signing the independent's petition all registered voters who voted in the primary. In theory, it could be that voting in the primary was so close to 100% of those registered, and new registrations since closing the books before primary day were so low, that eligible signers of an unaffiliated candidate's petition would number less than the total signatures required. This is unlikely, for it is usual that a substantial percentage of those eligible do not vote in the primary, and there were undoubtedly millions of voters qualified to vote in the 1972 primary. But it is not at all unlikely that the available pool of possible signers, after eliminating the total primary vote, will be substantially smaller than the total vote in the last general election and that it will require substantially more than 5% of the eligible pool to produce the necessary 325,000 signatures. This would be in excess, percentagewise, of anything the Court has approved to date as a precondition to an independent's securing a place on the ballot and in excess of the 5% which we said in *Jenness* was higher than the requirement imposed by most state election codes.¹⁰

¹⁰ See also *Auerbach v. Mandel*, 409 U. S. 808 (1972) (3%); *Wood v. Putterman*, 316 F. Supp. 646 (three-judge court), aff'd mem., 400 U. S. 859 (1970) (3%); and *Beller v. Kirk*, 328 F. Supp. 485 (SD Fla. 1970) (three-judge court), aff'd mem. *sub nom. Beller v. Askev*, 403 U. S. 925 (1971) (3%). We note that

We are quite sure, therefore, that further proceedings should be had in the District Court to permit further findings with respect to the extent of the burden imposed on independent candidates for President and Vice President under California law. Standing alone, gathering 325,000 signatures in 24 days would not appear to be an impossible burden. Signatures at the rate of 13,820 per day would be required, but 1,000 canvassers could perform the task if each gathered 14 signers a day. On its face, the statute would not appear to require an impractical undertaking for one who desires to be a candidate for President. But it is a substantial requirement; and if the additional likelihood is, as it seems to us to be, that the total signatures required will amount to a substantially higher percentage of the available pool than the 5% stipulated in the statute, the constitutional claim asserted by Hall is not frivolous. Before the claim is finally dismissed, it should be determined whether the available pool is so diminished in size by the disqualification of those who voted in the primary that the 325,000-signature requirement, to be satisfied in 24 days, is too great a burden on the independent candidates for the offices of President and Vice President.

Because further proceedings are required, we must resolve certain issues that are in dispute in order that the ground rules for the additional factfinding in the District Court will more clearly appear. First, we have no doubt about the validity of disqualifying from signing an independent candidate's petition all those registered voters who voted a partisan ballot in the primary, although they did not vote for the office sought by the

in *Socialist Labor Party v. Rhodes*, 318 F. Supp. 1262 (1970) (three-judge court), the District Court struck down a 7% petition requirement. That issue became moot on appeal, *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 585 (1972).

independent. We have considered this matter at greater length in *American Party of Texas v. White*, see *post*, at 785-786, and we merely repeat here that a State may confine each voter to one vote in one primary election, and that to maintain the integrity of the nominating process the State is warranted in limiting the voter to participating in but one of the two alternative procedures, the partisan or the nonpartisan, for nominating candidates for the general election ballot.

Second, the District Court apparently had little doubt that the California law disqualified anyone voting in the primary election, whether or not he confined his vote to nonpartisan offices and propositions.¹¹ The State of California asserts this to be an erroneous interpretation of California law and claims that the District Court should have abstained to permit the California courts to address the question. In any event, the State does not attempt to justify disqualifying as signers of an independent's petition those who voted only a nonpartisan ballot at the primary, such as independent voters who themselves were disqualified from voting a partisan ballot. See § 311 (Supp. 1974). With what we have before us, it would be difficult to ascertain any rational ground, let alone a compelling interest, for disqualifying nonpartisan voters at the primary from signing an independent candidate's petition, and we think the District Court should reconsider the matter in the light of tentative views expressed here. Under the controlling cases, the District Court may, if it is so advised, abstain and permit the California courts to construe the California statute. On the other hand, it may be that adding to

¹¹ Two ballots are authorized in California primaries, the one for partisan office and the other for nonpartisan offices and propositions. See §§ 10014, 10232, 10318. A voter may take only the nonpartisan ballot and refrain from voting on partisan candidates.

the qualified pool of signers all those nonpartisan voters at the primary may make so little difference in the ultimate assessment of the overall burden of the signature requirement that the status of the nonpartisan voter is in fact an insignificant consideration not meriting abstention.¹²

Third, once the number of signatures required in the 24-day period is ascertained, along with the total pool from which they may be drawn, there will arise the inevitable question for judgment: in the context of California politics, could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot? Past experience will be a helpful, if not always an unerring, guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not. We note here that the State mentions only one instance of an independent candidate qualifying for any office under § 6430, but disclaims having made any comprehensive survey of the official records that would perhaps reveal the truth of the matter. One of the difficulties will be that the number of signatures required will vary with the total vote in the last election;

¹² From the official published voting statistics published by the California Secretary of State, it would appear that the total vote in the 1972 primaries, seemingly the total number of persons voting, was 6,460,220, while the total vote for partisan presidential candidates was 5,880,845. Thus all but approximately 579,000 voted for a partisan candidate in the presidential primary and it is likely that many of the 579,000 not voting for President cast a partisan ballot for other candidates. But assuming that they did not, the maximum addition to the pool available to Hall would be 579,000, probably a relatively small difference in terms of the total number of eligible signers. See Secretary of State, Statement of Vote, State of California, Consolidated Primary Election, June 6, 1972, pp. 3, 4-23.

the total disqualifying vote at the primary election and hence the size of the eligible pool of possible signers will also vary from election to election. Also to be considered is the relationship between the showing of support through a petition requirement and the percentage of the vote the State can reasonably expect of a candidate who achieves ballot status in the general election.

As a preliminary matter, it would appear that the State, having disqualified defeated candidates and recent defectors, has in large part achieved its major purpose of providing and protecting an effective direct primary system and must justify its independent signature requirements chiefly by its interest in having candidates demonstrate substantial support in the community so that the ballot, in turn, may be protected from frivolous candidacies and kept within limits understandable to the voter. If the required signatures approach 10% of the eligible pool of voters, is it necessary to serve the State's compelling interest in a manageable ballot to require that the task of signature gathering be crowded into 24 days?¹³ Of course, the petition period must end at a reasonable time before election day to permit nomination papers to be verified. Neither must California abandon its policy of confining each voter to a single nominating act—either voting in the partisan primary or a signature on an independent petition. But the question remains whether signature gathering must

¹³ Appellees argue only that the independent candidate's canvassing for signatures should await the announcement of the primary winners and the promulgation of party platforms so that the voters eligible to sign, i. e., those not voting in the primary will have a meaningful choice between the primary nominations and the independents. This does not appear to be a matter particularly relevant to signing petitions for ballot position, for the meaningful choice referred to by appellees will be finally presented at the general election.

await conclusion of the primary. It would not appear untenable to permit solicitation of signatures to begin before primary day and finish afterwards. Those signing before the primary could either be definitely disqualified from a partisan vote in the primary election or have the privilege of canceling their petition signatures by the act of casting a ballot in the primary election. And if these alternatives are unacceptable, there would remain the question whether it is essential to demonstrate community support to gather signatures of substantially more than 5% of the group from which the independent is permitted to solicit support.¹⁴

Appellees insist, however, that the signature requirements for independent candidates are of no consequence because it has provided a valid way for new political parties to qualify for ballot position, an alternative that Hall could have pursued, but did not. Under § 6430, new political parties can be recognized and qualify their candidate for ballot position if 135 days before a primary election it appears that voters equal in number to at least 1% of the entire vote of the State at the last preceding gubernatorial election have declared to the

¹⁴ It may help to put this case in proper context to hypothesize the scope of Hall's petition and signature burden under the California law by employing the election statistics available from official sources in California. Assuming that the "entire vote" in the last general election was the total number of persons voting in the 1970 election, 6,633,400, 5% of that figure, or the total number of signatures required, is 331,670. See Secretary of State, Statement of Vote, General Election, November 7, 1972, p. 6. The total registration for the 1972 primary was 9,105,287. See 1972 Primary Vote, p. 3. Adding to this figure an estimate of the increase in registration since the primary date and subtracting the minimum partisan vote at the primary election, the available pool of possible signers, by this calculation, would be 4,072,279, see Secretary of State, Report of Registration, September 1972, p. 8, of which the required 331,670 signatures was 8.1%.

county clerks their intention to affiliate with the new party, or if, by the same time, the new party files a petition with signatures equal in number to 10% of the last gubernatorial vote.¹⁵ It is argued that the 1% registration requirement is feasible, has recently been resorted to successfully by two new political parties now qualified for the California ballot, and goes as far as California constitutionally must go in providing an alternative to the direct party primary of the major parties.

It may be that the 1% registration requirement is a valid condition to extending ballot position to a new political party. Cf. *American Party of Texas v. White*, post, p. 767. But the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other. A new party organization contemplates a statewide, ongoing organization with distinctive political character. Its goal is typically to gain control of the machinery of state government by electing its candidates to public office. From the standpoint of a potential supporter, affiliation with the new party would mean giving up his ties with another party or sacrificing his own independent status, even though his possible interest in the new party centers around a particular candidate for a particular office. For the candidate himself, it would mean undertaking the serious responsibilities of qualified party status under California law, such as the conduct of a primary, holding party conventions, and the promulgation of party platforms. But more fundamentally, the candidate, who is by definition an independent and desires to remain one, must now consider himself a party man,

¹⁵ The 1% registration requirement contemplates independent voters registering as affiliated with the party. The 10%-signature requirement, on the other hand, need not involve signers changing their registration.

surrendering his independent status. Must he necessarily choose the political party route if he wants to appear on the ballot in the general election? We think not.

In *Williams v. Rhodes*, the opportunity for political activity within either of two major political parties was seemingly available to all. But this Court held that to comply with the First and Fourteenth Amendments the State must provide a feasible opportunity for new political organizations and their candidates to appear on the ballot. No discernible state interest justified the burdensome and complicated regulations that in effect made impractical any alternative to the major parties. Similarly, here, we perceive no sufficient state interest in conditioning ballot position for an independent candidate on his forming a new political party as long as the State is free to assure itself that the candidate is a serious contender, truly independent, and with a satisfactory level of community support.¹⁸

Accordingly, we vacate the judgment in No. 72-812 insofar as it refused relief to Hall and Tyner and remand the case in this respect to the District Court for further proceedings consistent with this opinion. In all other respects, the judgment in No. 72-812 and No. 72-6050 is affirmed.

So ordered.

¹⁸ Appellants also contend that § 6830 (d) (Supp. 1974) purports to establish an additional qualification for office of representative and is invalid under Art. I, § 2, cl. 2, of the Constitution. The argument is wholly without merit. Storer and Frommshagen would not have been disqualified had they been nominated at a party primary or by an adequately supported independent petition and then elected at the general election. The non-affiliation requirement no more establishes an additional requirement for the office of representative than the requirement that the candidate win the primary to secure a place on the general ballot or otherwise demonstrate substantial community support.

APPENDIX TO OPINION OF THE COURT

California Elections Code

§ 41. "Nonpartisan office"

"Nonpartisan office" means an office for which no party may nominate a candidate. Judicial, school, county, and municipal offices are nonpartisan offices.

§ 311 [Supp. 1974]. Declaration of political affiliation; voting at primary elections

At the time of registering and of transferring registration, each elector may declare the name of the political party with which he intends to affiliate at the ensuing primary election. The name of that political party shall be stated in the affidavit of registration and the index.

If the elector declines to state his political affiliation, he shall be registered as "Nonpartisan" or "Declines to state," as he chooses. If the elector declines to state his political affiliation, he shall be informed that no person shall be entitled to vote the ballot of any political party at any primary election unless he has stated the name of the party with which he intends to affiliate at the time of registration. He shall not be permitted to vote the ballot of any party or for delegates to the convention of any party other than the party designated in his registration.

§ 2500. General election

There shall be held throughout the State, on the first Tuesday after the first Monday of November in every even-numbered year, an election, to be known as the general election.

§ 2501. Direct primary

For the nomination of all candidates to be voted for at the general election, a direct primary shall be held at

the legally designated polling places in each precinct on the first Tuesday after the first Monday in the immediately preceding June.

§ 2502. Primary elections

Any primary election other than the direct primary or presidential primary shall be held on Tuesday, three weeks next preceding the election for which the primary election is held.

§ 6401 [Supp. 1974]. Party affiliation

No declaration of candidacy for a partisan office or for membership on a county central committee shall be filed, either by the candidate himself or by sponsors on his behalf, (1) unless at the time of presentation of the declaration and continuously for not less than three months immediately prior to that time, or for as long as he has been eligible to register to vote in the state, the candidate is shown by his affidavit of registration to be affiliated with the political party the nomination of which he seeks, and (2) the candidate has not been registered as affiliated with a political party other than that political party the nomination of which he seeks within 12 months immediately prior to the filing of the declaration.

The county clerk shall attach a certificate to the declaration of candidacy showing the date on which the candidate registered as intending to affiliate with the political party the nomination of which he seeks, and indicating that the candidate has not been affiliated with any other political party for the 12-month period immediately preceding the filing of the declaration.

§ 6402. Independent nominees

This chapter does not prohibit the independent nomination of candidates under the provisions of Chapter 3

(commencing at Section 6800) of this division, subject to the following limitations:

(a) A candidate whose name has been on the ballot as a candidate of a party at the direct primary and who has been defeated for that party nomination is ineligible for nomination as an independent candidate. He is also ineligible as a candidate named by a party central committee to fill a vacancy on the ballot for a general election.

(b) No person may file nomination papers for a party nomination and an independent nomination for the same office, or for more than one office at the same election.

§ 6430. Qualified parties

A party is qualified to participate in any primary election:

(a) If at the last preceding gubernatorial election there was polled for any one of its candidates who was the candidate of that party only for any office voted on throughout the State, at least 2 percent of the entire vote of the State; or

(b) If at the last preceding gubernatorial election there was polled for any one of its candidates who, upon the date of that election, as shown by the affidavits of registration of voters in the county of his residence, was affiliated with that party and was the joint candidate of that party and any other party for any office voted on throughout the State, at least 6 percent of the entire vote of the State; or

(c) If on or before the 135th day before any primary election, it appears to the Secretary of State, as a result of examining and totaling the statement of voters and their political affiliations transmitted to him by the county clerks, that voters equal in number to at least 1 percent of the entire vote of the State at the last preceding gubernatorial election have declared their intention to affiliate with that party; or

(d) If on or before the 135th day before any primary election, there is filed with the Secretary of State a petition signed by voters, equal in number to at least 10 percent of the entire vote of the State at the last preceding gubernatorial election, declaring that they represent a proposed party, the name of which shall be stated in the petition, which proposed party those voters desire to have participate in that primary election. This petition shall be circulated, signed, verified and the signatures of the voters on it shall be certified to and transmitted to the Secretary of State by the county clerks substantially as provided for initiative petitions. Each page of the petition shall bear a caption in 18-point blackface type, which caption shall be the name of the proposed party followed by the words "Petition to participate in the primary election." No voters or organization of voters shall assume a party name or designation which is so similar to the name of an existing party as to mislead voters.

Whenever the registration of any party which qualified in the previous direct primary election falls below one-fifteenth of 1 percent of the total state registration, that party shall not be qualified to participate in the primary election but shall be deemed to have been abandoned by the voters, since the expense of printing ballots and holding a primary election would be an unjustifiable expense and burden to the State for so small a group. The Secretary of State shall immediately remove the name of the party from any list, notice, ballot, or other publication containing the names of the parties qualified to participate in the primary election.

§ 6490 [Supp. 1974]. Declaration of candidacy

No candidate's name shall be printed on the ballot to be used at a direct primary unless a declaration of his

candidacy is filed not less than 83 and not more than 113 days prior to the direct primary.

The declaration may be made by the candidate or by sponsors on his behalf.

When the declaration is made by sponsors the candidate's affidavit of acceptance shall be filed with the declaration.

§ 6611. Unsuccessful candidate; ineligibility as candidate of another party

A candidate who fails to receive the highest number of votes for the nomination of the political party with which he was registered as affiliated on the date his declaration of candidacy or declaration of acceptance of nomination was filed with the county clerk cannot be the candidate of any other political party.

§ 6803. Group of candidates for presidential electors; designation of presidential and vice presidential candidates

Whenever a group of candidates for presidential electors, equal in number to the number of presidential electors to which this State is entitled, files a nomination paper with the Secretary of State pursuant to this chapter, the nomination paper may contain the name of the candidate for President of the United States and the name of the candidate for Vice President of the United States for whom all of those candidates for presidential electors pledge themselves to vote.

§ 6804. Printing of names on ballot

When a group of candidates for presidential electors designates the presidential and vice presidential candidates for whom all of the group pledge themselves to vote, the names of the presidential candidate and vice presidential candidate designated by that group shall be printed on the ballot.

§ 6830 [Supp. 1974]. Contents

Each candidate or group of candidates shall file a nomination paper which shall contain:

(a) The name and residence address of each candidate, including the name of the county in which he resides.

(b) A designation of the office for which the candidate or group seeks nomination.

(c) A statement that the candidate and each signer of his nomination paper did not vote at the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper. The statement required in this subdivision shall be omitted when no candidate was nominated for the office at the preceding primary election.

(d) A statement that the candidate is not, and was not at any time during the one year preceding the immediately preceding primary election at which a candidate was nominated for the office mentioned in the nomination paper, registered as affiliated with a political party qualified under the provisions of Section 6430. The statement required by this subdivision shall be omitted when no primary election was held to nominate candidates for the office to which the independent nomination paper is directed.

§ 6831. Signatures required

Nomination papers shall be signed by voters of the area for which the candidate is to be nominated, not less in number than 5 percent nor more than 6 percent of the entire vote cast in the area at the preceding general election. Nomination papers for Representative in Congress, State Senator or Assemblyman, to be voted for at a special election to fill a vacancy, shall be signed by voters in the district not less in number than 500 or 1 percent of the entire vote cast in the area at the pre-

ceding general election, whichever is less, nor more than 1,000.

§ 6833 [Supp. 1974]. Time for filing, circulation and signing; verification

Nomination papers required to be filed with the Secretary of State or with the county clerk shall be filed not more than 79 nor less than 54 days before the day of the election, but shall be prepared, circulated, signed, verified and left with the county clerk for examination, or for examination and filing, no earlier than 84 days before the election and no later than 5 p. m. 60 days before the election. If the total number of signatures submitted to a county clerk for an office entirely within that county does not equal the number of signatures needed to qualify the candidate, the county clerk shall declare the petition void and is not required to verify the signatures. If the district falls within two or more counties, the county clerk shall within two working days report in writing to the Secretary of State the total number of signatures filed. If the Secretary of State finds that the total number of signatures filed in the district or state is less than the minimum number required to qualify the candidate he shall within one working day notify in writing the counties involved that they need not verify the signatures.

§ 10014. Ballots for voters at primary elections

At a primary election only a nonpartisan ballot shall be furnished to each voter who is not registered as intending to affiliate with any one of the political parties participating in the primary election; and to any voter registered as intending to affiliate with a political party participating in a primary election, there shall be furnished only a ballot of the political party with which he is registered as intending to affiliate.

§ 10232. Inconveniently large ballots

If the election board of a county determines that due to the number of candidates and measures that must be printed on the general election ballot, the ballot will be larger than may be conveniently handled, the board may order nonpartisan offices and local measures omitted from the general election ballot and printed on a separate ballot in a form substantially the same as provided for the general election ballot. If the board so orders, each voter shall receive both ballots, and the procedure prescribed for the handling and canvassing of ballots shall be modified to the extent necessary to permit the use of two ballots by a voter. The board may, in such case, order the second ballot to be printed on paper of a different tint and assign to those ballots numbers higher than those assigned to the ballots containing partisan offices and statewide ballot measures.

§ 10318. Inconveniently large ballots

If the election board of a county determines that due to the number of candidates and measures that must be printed on the direct primary ballot the ballot will be larger than may be conveniently handled, the board may provide that a nonpartisan ballot shall be given to each partisan voter, together with his partisan ballot, and that the material appearing under the heading "Nonpartisan Offices" on partisan ballots, as well as the heading itself, shall be omitted from the partisan ballots. If the board so provides, the procedure prescribed for the handling and canvassing of ballots shall be modified to the extent necessary to permit the use of two ballots by partisan voters.

§ 18600 [Supp. 1974]. Write-in votes

Any name written upon a ballot shall be counted, unless prohibited by Section 18603, for that name for the

office under which it is written, if it is written in the blank space therefor, whether or not a cross (+) is stamped or made with pen or pencil in the voting square after the name so written.

§ 18601 [Supp. 1974]. Declaration required

Every person who desires to have his name as written on the ballots of an election counted for a particular office shall file a declaration stating that he is a write-in candidate for the nomination for or election to the particular office and giving the title of that office.

§ 18602 [Supp. 1974]. Declaration; filing

The declaration required by Section 18601 shall be filed no later than the eighth day prior to the election to which it applies. It shall be filed with the clerks, registrar of voters, or district secretary responsible for the conduct of the election in which the candidate desires to have write-in votes of his name counted.

§ 18603 [Supp. 1974]. Requirements for tabulation of write-in vote

No name written upon a ballot in any state, county, city, city and county, or district election shall be counted for an office or nomination unless

(a) A declaration has been filed pursuant to Sections 18601 and 18602 declaring a write-in candidacy for that particular person for that particular office or nomination and

(b) The fee required by Section 6555 is paid when the declaration of write-in candidacy is filed pursuant to Section 18602.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL concur, dissenting.

The Court's opinion in these cases, and that in *American Party of Texas v. White*, post, p. 767, hold—correctly

in my view—that the test of the validity of state legislation regulating candidate access to the ballot is whether we can conclude that the legislation, strictly scrutinized, is necessary to further compelling state interests. See *ante*, at 736; *American Party of Texas v. White*, *post*, at 780–781; for, as we recognized in *Williams v. Rhodes*, 393 U. S. 23, 30 (1968), such state laws “place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.” The right to vote derives from the right of association that is at the core of the First Amendment, protected from state infringement by the Fourteenth Amendment. *NAACP v. Button*, 371 U. S. 415, 430 (1963); *Bates v. Little Rock*, 361 U. S. 516, 522–523 (1960); *NAACP v. Alabama*, 357 U. S. 449, 460–461 (1958). Indeed, the right to vote is “a fundamental political right, because preservative of all rights,” *Yick Wo v. Hopkins*, 118 U. S. 356, 370 (1886), and “[o]ther rights, even the most basic, are illusory if the right to vote is undermined,” *Wesberry v. Sanders*, 376 U. S. 1, 17 (1964). See also *Reynolds v. Sims*, 377 U. S. 533, 555 (1964). Thus, when legislation burdens such a fundamental constitutional right, it is not enough that the legislative means rationally promote legitimate governmental ends. Rather,

“governmental action may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial governmental interest. *Shapiro v. Thompson*, 394 U. S. [618, 634 (1969)]; *United States v. Jackson*, 390 U. S. 570, 582–583 (1968); *Sherbert v. Verner*, 374 U. S. 398, 406–409 (1963). And once it be determined that a burden has been

placed upon a constitutional right, the onus of demonstrating that no less intrusive means will adequately protect compelling state interests is upon the party seeking to justify the burden. See *Speiser v. Randall*, 357 U. S. 513, 525-526 (1958)." *Oregon v. Mitchell*, 400 U. S. 112, 238 (1970) (separate opinion of BRENNAN, WHITE, and MARSHALL, JJ.).

See also *Dunn v. Blumstein*, 405 U. S. 330, 336-337 (1972); *Kramer v. Union Free School District*, 395 U. S. 621, 627 (1969); *Williams v. Rhodes*, 393 U. S., at 31.

I have joined the Court's opinion in *American Party of Texas v. White*, *supra*,¹ because I agree that, although the conditions for access to the general election ballot imposed by Texas law burden constitutionally protected rights, nevertheless those laws "are constitutionally valid measures, reasonably taken in pursuit of vital state objectives that cannot be served equally well in significantly less burdensome ways." *Post*, at 781. I dissent, however, from the Court's holding in these cases that, although the California party disaffiliation rule, California Elections Code § 6830 (d) (Supp. 1974), also burdens constitutionally protected rights, California's compelling state interests "cannot be served equally well in significantly less burdensome ways."

I

The California statute absolutely denies ballot position to independent candidates who, at any time within 12 months prior to the immediately preceding primary election, were registered as affiliated with a qualified political party. Intertwined with California Elections Code §§ 2500-2501 (1961), which require primary elec-

¹ MR. JUSTICE DOUGLAS adheres to the views stated in his dissenting opinion in *American Party of Texas v. White*, *post*, p. 795.

tions to be held five months before the general election, § 6830 (d) (Supp. 1974) plainly places a significant burden upon independent candidacy—and therefore effectively burdens as well the rights of potential supporters and voters to associate for political purposes and to vote, see *Williams v. Rhodes*, *supra*, at 30; *Bullock v. Carter*, 405 U. S. 134, 143 (1972)—because potential independent candidates, currently affiliated with a recognized party, are required to take affirmative action toward candidacy fully 17 months before the general election. Thus, such candidates must make that decision at a time when, as a matter of the realities of our political system, they cannot know either who will be the nominees of the major parties, or what the significant election issues may be. That is an impossible burden to shoulder. We recognized in *Williams v. Rhodes*, *supra*, at 33, that “the principal policies of the major parties change to some extent from year to year, and . . . the identity of the likely major party nominees may not be known until shortly before the election” Today, not even the casual observer of American politics can fail to realize that often a wholly unanticipated event will in only a matter of months dramatically alter political fortunes and influence the voters’ assessment of vital issues. By requiring potential independent candidates to anticipate, and crystallize their political responses to, these changes and events 17 months prior to the general election, § 6830 (d) (Supp. 1974) clearly is out of step with “the potential fluidity of American political life,” *Jenness v. Fortson*, 403 U. S. 431, 439 (1971), operating as it does to discourage independent candidacies and freeze the political status quo.

The cases of appellants Storer and Frommshagen pointedly illustrate how burdensome California’s party disaffiliation rule can be. Both Storer and Frommshagen sought to run in their respective districts as inde-

pendent candidates for Congress. The term of office for the United States House of Representatives, of course, is two years. Thus, § 6830 (d) (Supp. 1974) required Storer and Frommhamen to disaffiliate from their parties within *seven months* after the preceding congressional election. Few incumbent Congressmen, however, declare their intention to seek re-election seven months after election and only four months into their terms. Yet, despite the unavailability of this patently critical piece of information, Storer and Frommhamen were forced by § 6830 (d) (Supp. 1974) to evaluate their political opportunities and opt in or out of their parties 17 months before the next congressional election.

The Court acknowledges the burdens imposed by § 6830 (d) (Supp. 1974) upon fundamental personal liberties, see *ante*, at 734, but agrees with the State's assertion that the burdens are justified by the State's compelling interest in the stability of its political system, *ante*, at 736. Without § 6830 (d) (Supp. 1974), the argument runs, the party's primary system, an integral part of the election process, is capable of subversion by a candidate who first opts to participate in that method of ballot access, and later abandons the party and its candidate selection process, taking with him his party supporters. Thus, in sustaining the validity of § 6830 (d) (Supp. 1974), the Court finds compelling the State's interests in preventing splintered parties and unrestricted factionalism and protecting the direct primary system, *ante*, at 736.²

² The Court also opines that § 6830 (d) (Supp. 1974) may be "a substantial barrier to a party fielding an 'independent' candidate to capture and bleed off votes in the general election that might well go to another party," *ante*, at 735. But the State suggests no reliance upon this alleged interest and we are therefore not at liberty to turn our decision upon our conjecture that this might have been a state objective. In any event, the prospect of such a misuse seems more fanciful than real and, as we said in *Williams v. Rhodes*, 393 U. S.

But the identification of these compelling state interests, which I accept, does not end the inquiry. There remains the necessity of determining whether these vital state objectives "cannot be served equally well in significantly less burdensome ways." Compelling state interests may not be pursued by

"means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' *NAACP v. Button*, 371 U. S. 415, 438 (1963); *United States v. Robel*, 389 U. S. 258, 265 (1967), and must be 'tailored' to serve their legitimate objectives. *Shapiro v. Thompson* [394 U. S. 618, 631 (1969)]. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.' *Shelton v. Tucker*, 364 U. S. 479, 488 (1960)." *Dunn v. Blumstein*, 405 U. S., at 343.

While it is true that the Court purports to examine into "less drastic means," its analysis is wholly inadequate. The discussion is limited to these passing remarks, *ante*, at 736:

"Nor do we have reason for concluding that the device California chose, § 6830 (d) (Supp. 1974), was not an essential part of its overall mechanism to achieve its acceptable goals. As we indicated in *Rosario*, the Constitution does not require the State to choose ineffectual means to achieve its aims. To conclude otherwise might sacrifice the political stability of the system of the State, with profound con-

23, 33 (1968), "[n]o such remote danger can justify [an] immediate and crippling impact on . . . basic constitutional rights . . ."

sequences for the entire citizenry, merely in the interest of particular candidates and their supporters having instantaneous access to the ballot."

Naturally, the Constitution does not require the State to choose ineffective means to achieve its aims. The State must demonstrate, however, that the means it has chosen are "necessary." *Shapiro v. Thompson*, 394 U. S. 618, 634 (1969). See also *American Party of Texas v. White*, post, at 780-781.

I have searched in vain for even the slightest evidence in the records of these cases of any effort on the part of the State to demonstrate the absence of reasonably less burdensome means of achieving its objectives. This crucial failure cannot be remedied by the Court's conjecture that other means "might sacrifice the political stability of the system of the State" (emphasis added). When state legislation burdens fundamental constitutional rights, as conceded here, we are not at liberty to speculate that the State might be able to demonstrate the absence of less burdensome means; the burden of affirmatively demonstrating this is upon the State. *Dunn v. Blumstein*, supra, at 343; *Shapiro v. Thompson*, supra, at 634; *Sherbert v. Verner*, 374 U. S. 398, 406-409 (1963).

Moreover, less drastic means—which would not require the State to give appellants "instantaneous access to the ballot"—seem plainly available to achieve California's objectives. First, requiring party disaffiliation 12 months before the primary elections is unreasonable on its face. There is no evidence that splintering and factionalism of political parties will result unless disaffiliation is effected that far in advance of the primaries. To the contrary, whatever threat may exist to party stability is more likely to surface only shortly before the primary, when the identities of the potential field of candidates and issues

become known. See *Williams v. Rhodes*, 393 U. S., at 33. Thus, the State's interests would be adequately served and the rights of the appellants less burdened if the date when disaffiliation must be effected were set significantly closer to the primaries. Second, the requirement of party disaffiliation could be limited to those independent candidates who actually run in a party primary. Section 6830 (d) (Supp. 1974) sweeps far too broadly in its application to potential independent candidates who, though registered as affiliated with a recognized party, do not run for the party's nomination. Such an independent candidate plainly poses no threat of utilizing the party machinery to run in the primary, and then declaring independent candidacy, thereby splitting the party.

II

I also dissent from the Court's remand, in the case of appellants Hall and Tyner, of the question concerning the constitutionality of the petition requirements imposed upon independent candidates. Under the relevant statutes, Hall and Tyner, candidates for President and Vice President, were required to file signatures equal to 5% of the total vote cast in California's preceding general election. § 6831. However, the pool from which signatures could be drawn excluded all persons who had voted in the primary elections, including voters who had cast nonpartisan ballots. § 6830 (c) (Supp. 1974). Furthermore, circulation of the petitions was not permitted until two months after the primaries, and the necessary signatures were required to be obtained during a 24-day period. § 6833 (Supp. 1974). The Court avoids resolving the constitutionality of these election laws by remanding to the District Court for further proceedings. On remand, the District Court is directed to determine (1) the total vote cast in the last general election as a predi-

cate to computation of the 5% of signatures required by the statutory provision, and (2) the size of the pool to which appellants were required to limit their efforts in obtaining signatures. The Court reasons that these findings are necessary to a determination "whether the available pool is so diminished in size by the disqualification of those who voted in the primary that the 325,000-signature requirement, to be satisfied in 24 days, is too great a burden on the independent candidates for the offices of President and Vice President." *Ante*, at 740.

If such a remand were directed in the cases of Storer and Frommshagen I could agree, for in those cases there is a complete absence of data necessary to facilitate determination of the actual percentage of available voters that appellants Storer and Frommshagen were required to secure. A remand in the case of Hall and Tyner, however, is unnecessary because the data upon which relevant findings must be based are already available to us. The data are cited by the Court, *ante*, at 742 n. 12 and at 744 n. 14. Evaluated in light of our decision in *Jenness v. Fortson*, *supra*, the data leave no room for doubt that California's statutory requirements are unconstitutionally burdensome as applied to Hall and Tyner. Official voting statistics published by the California Secretary of State indicate that 6,633,400 persons voted in the 1970 general election. See Secretary of State, Statement of Vote, General Election, November 7, 1972, p. 6. Appellants were required to secure signatures totaling 5% of that number, *i. e.*, 331,670. The statistics also indicate the size of the total pool from which appellants were permitted to gather signatures. The total number of registered voters on September 14, 1972—the last day appellants were permitted to file nomination petitions—was 9,953,124. See Secretary of State, Report of Registration, September 1972, p. 8. Of that number, 6,460,220

registered voters could not sign petitions because they had voted in the 1972 primary elections. See Secretary of State, Statement of Vote, Consolidated Primary Election, June 6, 1972, pp. 3, 4-23. Thus, the total pool of registered voters available to appellants was reduced to approximately 3,492,904, of which the required 331,670 signatures was 9.5%.³

In my view, a percentage requirement even approaching the range of 9.5% serves no compelling state interest which cannot be served as well by less drastic means. To be sure, in *Jenness* we acknowledged that:

"There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." 403 U.S., at 442.

We there upheld the constitutionality of Georgia's election laws requiring potential independent candidates to gather the signatures equal to 5% of the total eligible electorate at the last general election for the office in question. However, candidates were given a full six months to circulate petitions and no restrictions were placed upon the pool of registered voters from which

³ The Court's computations, *ante*, at 744 n. 14, suggest that Hall and Tyner need only have collected signatures from 8.1% of the available voter pool. The Court's calculation assumes that the voter pool available to Hall and Tyner included approximately 579,000 persons who may have only voted in *nonpartisan* primaries. Section 6830 (c) (Supp. 1974) makes no such exception; the pool available for signatures is expressly limited to those voters who "did not vote at the immediately preceding primary election" I agree with the Court, however, that exclusion of persons voting at *nonpartisan* primaries is not supported by a compelling state interest.

signatures could be drawn. In that circumstance, we found that Georgia imposed no unduly burdensome restrictions upon the free circulation of nominating petitions. We noted:

"A voter may sign a petition even though he has signed others, and a voter who has signed the petition of a nonparty candidate is free thereafter to participate in a party primary. The signer of a petition is not required to state that he intends to vote for that candidate at the election. A person who has previously voted in a party primary is fully eligible to sign a petition, and so, on the other hand, is a person who was not even registered at the time of the previous election. No signature on a nominating petition need be notarized." *Id.*, at 438-439 (footnotes omitted).

Thus, although Georgia's 5% requirement was higher than that required by most States, the Court found it "balanced by the fact that Georgia . . . imposed no arbitrary restrictions whatever upon the eligibility of any registered voter to sign as many nominating petitions as he wishes." *Id.*, at 442.

California seeks to justify its election laws by pointing to the same substantial interests we identified in *Jenness*, of insuring that candidates possess a modicum of support, and that voters are not confused by the length of the ballot. But in sharp contrast to the election laws we upheld in *Jenness*, California's statutory scheme greatly restricted the pool of registered voters from which appellants Hall and Tyner were permitted to draw signatures. The 5% requirement, in reality, forced them to secure the signatures of 9.5% of the voters permitted by law to sign nomination petitions. Moreover, unlike Georgia's six-month period for gathering signa-

tures, the California election laws required appellants to meet that State's higher percentage requirement in only 24 days. Thus, even conceding the substantiality of its aims, the State has completely failed to demonstrate why means less drastic than its high percentage requirement and short circulation period—such as the statutory scheme enacted in Georgia—will not achieve its interests.

Accordingly, I would reverse the judgment of the District Court dismissing these actions, and remand for further proceedings consistent with this opinion.

